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It is regretted that the exigencies of the war have reduced the space available for book reviews and made it necessary to give no more than short notices of some of the works received for review.

FROM THE OLD LAW COURTS TO THE NEW

F. W. Maitland

[*The following article was first published in the* English Magazine, *vol. I* (1883—1884), *pp.* 3—15. *It had fifteen illustrations, thirteen of which were by Harry Furniss, the* Punch *artist; several of them were caricatures of leading judges and counsel. The article is a sketch, historical and geographical, of the superior Courts in London before their transition to the existing building in the Strand in* 1882. *We owe the discovery of the article, which is probably known to few living lawyers and, so far as we know, has not been re-published elsewhere, to Mr. Oliver, of Trinity Hall. Quite apart from the intrinsic value of everything that Maitland wrote, it is especially interesting as a survey of the Courts at the moment when, for the first time, they all set up house together, except for the final Courts of Appeal.*

We wish to express our gratitude to Professor Maitland's daughters, Miss Maitland and Mrs. Shove, for their kindness in permitting us to reprint the article; and also to Messrs. John Murray for their courtesy in allowing us to reproduce the print of Westminster Hall from Rosamond Bayne-Powell's "Eighteenth Century London Life."—Ed.]

THERE were some persons perhaps who on the 4th of December last, when the Queen went in pomp to open the new Law Courts, betook themselves not to the new hall, but to the old. Possibly they had no choice but to put up with the less gorgeous of the two pageants, for they were neither jurors in the Belt case[1] nor otherwise persons of mark. Or it may be they preferred to see the end of an old story—a very old story—to the beginning of a new. For such a choice there was something to be said. They may live to see many noteworthy sights in Mr. Street's new Courts; they will hardly see another procession of judges in Westminster Hall, and when the procession had passed, they may have felt that they had seen what was worth remembering. Not that there was any excuse for profound emotion, but still something had happened; the curtain had fallen on a scene which began who shall say how long ago? Possibly some readers may be so far like-minded with these spectators, that having seen through the artist's eye something of the judges as they sit in their new Courts, and being of the sound opinion that a good picture needs no bush of words, they will be willing to throw a glance back on Westminster Hall.

By a little manipulation of definitions it might be proved that the Courts have not left Westminster, and possibly the proof might satisfy a sentimental craving, for Westminster is the capital of England, and has been so ever since England has had a capital. This is no place in

[1] [*Belt* v. *Lawes*, 51 L. J. Q. B. 359: a libel case of some notoriety in that year.—Ed.]

which to discuss metes and bounds, only let us not think of London as having been the head of the realm and the laws. London from first to last is the stronghold of privilege, chartered and prescriptive; Westminster with no more organisation than that of a mere rural manor, becomes the home of Common Law, of law, that is, common to the whole land. In a word, London is civic; Westminster is national. Here, well outside the city (we must measure from Ludgate, not from the suburban bar near the Temple) was the king's palace, the centre of all national government. Here was the shrine of Edward the Confessor, whom events which happened after his death, rather than any merits of his own, had made the national saint, the saint of the Common Law. Here king after king promised to his people the laws of St. Edward. Even James the Second made the promise, and surely may be excused for breaking this part of his coronation oath, for if St. Edward had made any laws, and none which can be ascribed to him are forthcoming, they would hardly have met the wants of the polite seventeenth century. But let that be; Edward's law meant national English law, and Westminster was its home.

The great hall too, almost the only part of the old palace that is still standing, is, so far as we know, the very first building within which any English court of justice sat regularly and permanently. Courts had usually been held in the open air, and long after the King's Court had begun to sit within walls, the old local courts of the shire and the hundred were still held on heath or hill, beneath no covering but the sky. All that human negligence can do has been done to burn down the hall at Westminster. Thrice, at least, has the old palace been blazing in flames, in 1298, 1512, and 1834, and smaller fires have there been without number. Late in the last century the House of Commons awoke to the fact that the hall was surrounded by buildings of the most inflammable sort, that taverns and coffee-houses had nestled themselves in against its western side, and against its very front, and that the kitchen of 'the clerk to the deputy usher of the Court of Exchequer,'—an official we must suppose of dreadful dignity, was smoking in close proximity. But negligence itself is not omnipotent, and the walls that Rufus built are still standing, walls of rubble work long since encased with newer masonry. Certainly the hall as Rufus built it must have been very different from the hall as we know it. He must have built in the majestic style of his day, the style of which Londoners have so fine an example in the Tower —a hall divided into a nave and aisles by massive pillars. The wonderful roof, the windows, the towers that flank the doorway, the flying buttresses now laid bare to view, and in short, the general look of the hall are the work of Richard the Second. The upper tier of windows and the doors along the western side are quite modern, and still more modern of course are the flight of stairs at the end of the hall and the whole building, St. Stephen's porch, which connects the hall with the new Houses of

Parliament. Fears have been felt lest the roof should fall. In pictures of Lord Lovat's trial, we see it supported by wooden props which stand on the floor, and then we hear of the lead being stripped from its outside to make it lighter. But Richard's hall, if not William's hall, had braved time and fire and the restorer, and in December last the judges were leaving the first home of English law, and that home is still standing.

Yet this departure of the judges was but one stage in a process that has been going on for a long time. We can look back to an age when one and the same body—the King's Court—was the one central organ of all government, administrative and judicial. Very gradually it became many. The King's Court became different from the Exchequer, the Exchequer from the Treasury, the Privy Council from the King's Court, the Cabinet from the Privy Council, the Common Bench from the King's Bench. This process we can see expressed in permanent terms of brick and mortar. The king's palace ceased to be the one place for all national business. Every offshoot of the King's Court found a new home for itself, and the buildings which now line Whitehall, the Government Offices as we call them, are the result. The king himself left his old abode for York House, or Whitehall Palace, for St. James's and elsewhere; and at length the old palace was the seat only of the highest Courts of Law and of the Parliament. We have lived to see one other change; the Courts have gone eastward. If they were to leave the hall, there was but one quarter to which they could go, for ever since there has been a lawyers' quarter it has been the district which lies between Gray's Inn and the river. Indeed, some thirty years ago the Chancery judges began the move, and have since sat in and near Lincoln's Inn, going to Westminster Hall only for a yearly pageant. At a much earlier date and by degrees the old dining hall of Lincoln's Inn became the place where the Chancellor sat out of term time. In this quarter too was the house, once a house of mercy for converted Jews, with which Edward the Third endowed the Master of the Rolls. The name of Cursitor Street marks an early settlement of Chancery officers, *clerici de cursu*, clerks who look after the matters of course. Here too were the serjeants' inns, the inns of court, the inns of chancery. By one means and another societies or guilds of lawyers became possessed of the Temple and of the inns or town houses which had once belonged to great families—Grays, Cliffords, Earls of Lincoln. Only very slowly did a town grow up around the palace of Westminster, and the lawyers had to find dwellings as near their Courts as conveniently might be. This quarter therefore was clearly the district destined from of old to surround the national judgment-seat, if ever that seat were removed from its old place.

But the highest of all Law Courts, the House of Lords, has not yet left the spot where the old palace stood. At least its present chamber is very near that spot. This qualification we are obliged to add, because just before the judges bade farewell to the hall, some of them had been

hearing much argument on the momentous question whether Lord Penzance sitting in Committee Room E was sitting within or without or athwart the very boundary of the old palace—a momentous question, for on the answer to it depended, as some supposed, the question whether his lordship could prohibit a clergyman from wearing certain antique vestments. But again we must refuse to discuss metes and bounds, and to us who are not concerned with the legality of chasubles the new palace at Westminster may well enough be the living representative of the old. So judicature and legislature are not yet quite disconnected, and an appeal still lies to the time-honoured place from the Courts which now sit between Lincoln's Inn and the Temple. In the old hall too, as one may suppose, a lord would be tried by his peers, and in the old hall too might be impeached any whom the Commons thought worth an impeachment. But an impeachment we are not likely to see, and we have hopes that our lords will refrain themselves from felony and from treason. The possibility however that the hall may still be used for a state trial will give us a good excuse for saying nothing of state trials—those great shows of justices for which the hall has been turned into a theatre; and we will speak of the hall as it looked when ordinary Courts of law were sitting therein to deal with the rights and wrongs of Styles and Nokes, and not of the hall as it looked when Strafford or Charles, Warren Hastings or the Duchess of Kingston, was at the bar in the midst of extraordinary galleries and upholsteries. And this may be well, for in general much more is known of the hall as decked out for some great occasion, than of its normal appearance.

Yet the old abodes of law and equity are the backgrounds of many famous scenes of which every one has to form some mental picture, and it is just as well that the picture should be tolerably correct. An elaborate print have we seen in which King Henry the Third is represented as confirming Magna Charta in front of the monstrous stone screen with which an architect of the eighteenth century was suffered to disfigure Westminster Hall. Without being pedants, and not hoping for perfect accuracy, we may wish to avoid such a blunder as this; but names endure, while the things for which they stand are slowly changing, and a familiar phrase may raise in our minds a picture quite false to fact. It may for instance give one a slight shock to think for the first time that there were English judges before there were wigs; but this of course is true. Judges and lawyers took to wigs when other men in a frivolous moment took to them; unfortunately they retained the silliest adornment that human head has yet invented for itself when even physicians and bishops had recovered their wonted sobriety. Indeed, when compared with the dresses which the judges sometimes wear, the wig is quite modern. A 'survival,' as the naturalist would say, of the really ancient head-dress may be seen in the little round black patch with a white border, which is to be found at the top of the wigs of those judges who are serjeants-at-law, a race which is now becoming extinct. This

represents a white coif surmounted by a black cap. The coif was a piece of white silk or lawn drawn over the back and top of the head, and the black cap is still, for some reason or other not known to us, produced at certain dread moments. Probably the history of the judges' robes is much the same as that of their wigs—they were once the ordinary garments worn by men of high station, but while other people changed the cut and colour of their clothes, the judges did not. However some at least of these robes are very old indeed. In an illuminated manuscript of the fifteenth century we may see the five judges of the King's Bench and the eight of the Common Pleas dressed in scarlet robes trimmed with white fur, very like though not exactly like, those still worn, and we know that even at that date such garments were official and distinctive. A judge of the Queen's Bench Division has many dresses, and these he changes in more or less strict accordance with an elaborate ritual formally settled in 1635; the business in hand, the season of the year, the feasts of the Church, all help in determining what his vestments shall be. But we had better return from our digression, lest we show ignorance or worse.

Of course Westminster Hall was not built to be a mere receptacle for divers courts of justice, any more than St. Stephen's Chapel was built in order that the House of Commons might within its walls make for itself a mean and ugly room, and afterwards cut away those walls that saints and angels might give place to Irish members. The crypt of that chapel was not built for a coal-hole, and to place a kitchen in the middle of the cloister was a brilliant after-thought. Westminster Hall was just the great hall of the old palace. But it may be necessary to remind the reader, so swift are changes in London, that until lately, three out of those four great Courts that went to make up our new High Court of Justice, sat actually in the hall itself. These three were the Chancery, the King's Bench, and the Common Pleas; the fourth, the Exchequer, had from of old its own chamber outside the hall. The chief fault, or rather misfortune, of the great hall that is the centre of Mr. Street's new Courts is that only a few jurymen and witnesses have ever any occasion to go there. The Courts which are ranged around it stand on a level much higher than its floor, and to that floor no judges or lawyer need even descend, nor may it be trodden by the mere spectator. But we must get rid of any notion of a silent, deserted, church-like building if we would think of Westminster Hall in old times; we must even forget that Westminster Hall was until the other day—a vast ante-chamber to Courts which opened out of it. In the hall itself there sat three Courts hardly secluded from a throng of buyers and sellers, loungers and gossips. In the seventeenth and some part of the eighteenth century, the hall was lined by the stalls of booksellers, haberdashers, and the like, a gay, noisy place. The king had quitted the old palace after the fire of 1512, and, somehow or another, the right to let shops in the hall belonged to the Warden of the Fleet. Overhead there were banners; at one time banners taken from the Scots at Worcester, at

another, banners taken from the French at Blenheim. Under foot there was sometimes water, for a high tide would flow into the hall. If we go back to a yet earlier time and suppose the king to be still living in the palace, the hall is the great public room useful for all manner of purposes. And in very early times a lawsuit was sometimes a most exciting scene. A litigant, if he could, would bring his friends to 'maintain' him in less peaceful fashion than that in which Mr. Newdegate maintained Mr. Clarke.[2] Words might lead to blows, and a free fight take place in the hall itself, in contempt of the king's majesty, and before the very eyes of his judges. On one occasion the defendant was left dying in the hall, while the plaintiff escaped pursued by a strenuous prince soon to be Edward the First. If you fought in Westminster Hall, you might lose your right hand, but the fear of this punishment was not always a sufficient restraint for hot-blooded suitors.

When the four great Courts, the judicial offspring of the omniparent King's Court, took up distinct positions in and near the hall, they soon appropriated, as it would seem, those stations in which we find them at the beginning of the last century. The hall, let it be remembered, lies almost due north and south at right angles to the Abbey. The great door is at the north end, and the side nearest the river is the east side. Now the Chancery and King's Bench were at the south end of the hall, the Chancery in the south-west corner, the King's Bench in the south-east. The Common Bench was against the west wall, near the north door. The Exchequer was not in the hall, and therefore may for the moment be neglected. The three Courts which were in the hall took up but a small part of the area. The Chancery and the King's Bench were raised upon a platform or dais some feet above the floor of the hall. A few steps led to the middle of this platform and there was a passage between the two Courts, which ended in a door through the south wall below the great window which has since been destroyed. That door recalled one of the tragedies of the hall. It had been made on the occasion of Strafford's trial, in order that the lords who were to try him might easily pass and repass to and from their own house, the ancient Parliament Chamber. Previously the outlets at this end of the hall had been doors in the side walls, and by the way it may be said that at different times, and for different purposes, many doors have been cut in the walls, and again blocked up. The two Courts themselves must have been slight insignificant structures, mere inclosures like loose boxes or family pews, surrounded by a wooden partition but a few feet high. They could be boarded over and galleries raised above them when there was to be a state trial in the body of the hall. They could be removed altogether for a coronation banquet, and then the royal table occupied their platform. The passage between the King's Bench and the Chancery was but narrow, so that the wretched suitor who, having gone to law when he should have gone

[2] [*Bradlaugh* v. *Newdegate* (1883) 1 Q. B. D. 11.—Ed.]

to equity, or to equity when he should have gone to law, was sent for his remedy to 'the other side of Westminster Hall,' had but a yard or two to go. In litigation, however, distance from your remedy must be reckoned not by the yard, but by the year, and so reckoned, the gulf between the two Courts was wide indeed. That gulf has now been filled up by wholesome legislation, and Mr. Street's new hall, though it may have four sides in fact, has but one side in law.

Just below these Courts we may see in old drawings a seat or two turned sideways. This is the side-bar where certain formal business was transacted, and 'side-bar rules' are still made more than a century after the cause of their name has been swept away. At this side-bar too, even in Queen Anne's day, the judges used to put on and take off their robes in the sight of all men. They had not yet acquired luxurious retiring rooms. Several writers of the last century believed that underneath the platform or dais of which we have spoken, there were still standing the great marble table at which the business of the Chancery had once been done, and the marble chair in which the chancellors had sat. What has become of them? This question has often been asked without provoking a reply. Perhaps the improver improved them away. Those who did not scruple to mutilate St. Stephen's Chapel would have had no pity for this ancient lumber. But the improver has so much to answer for touching his dealings at Westminster, that he shall have the benefit of a doubt.

Another inclosure similar to those already described fenced in the place of Common Pleas. It was, as already said, against the west wall near the great door. This, according to tradition, was the 'certain place' to which the Great Charter had pointed. 'Common Pleas,' said King John, 'shall not follow our Court, but shall be held in some certain place,' that is to say, 'If one subject has a suit against another, he shall not henceforth have to go tearing up and down the country for five long years in the attempt to get justice out of a hard-riding king, as Richard of Anesty,[3] one of the early heroes of litigation, has lately done; no, he shall find justice seated in some well-known spot.' Many will know the story, for Roger North told it, how Chief Justice Bridgeman refused to leave the hall and hold his Court in an adjoining room. When the wind was in the north, the draught from the great door might make the certain place disagreeably cold, still it was the certain place, and he might not sit elsewhere. Earlier judges had been less pedantic; when the hall was being repaired they sat in the neighbouring Abbey, and it seems that at least on one occasion the Common Bench was set up at York.

Just about the middle of the last century this certain place was finally abandoned. The Court retired to a room almost immediately behind the old spot, to which room access was had through an archway cut in

[3] [Stephen, History of Criminal Law, i, 88—90.—Ed.]

the hall's western side. From one source we learn that this room was small and inconvenient, from another, that the archway was a great ogee archway, 'silly and vulgar.' At about the same time, more permanent and pretentious abodes were built for the Chancery and King's Bench, but each retained its old corner.

A stone screen was built across the hall about one-sixth of the way from the south end, with two tiers of windows in it, and a doorway in the middle approached by a short flight of steps. An indignant antiquary says of this structure that it was a farrago of pinnacles and pineapplies, pointed compartments and ogee arches, buttresses and balustrades, a Grecian entablature and French ornaments. Prints, happily rare (for the inside of the hall has seldom been sketched, except when this strange erection has been hidden by the trappings of a state trial), fully bear out this description. The designer, it is said, was William Kent, painter, architect and landscape gardener, but the only designs of his seen by us are not quite so horrible as the thing that was actually built. Anything less in keeping with the simple hall than this mass of florid confectionery may not be imagined. Having gone up the steps which led to the doorway, one entered the Court of King's Bench on the level of the judges' seats, so that the barristers' benches seemed to be scooped out as in a cellar. What light there was came in from on high; and we are told that the place had a vault-like look, the look of a prison, not of a court. A skylight there must have been, for in 1785 it fell down, perhaps in compliance with Lord Mansfield's favourite adjuration (*fiat justitia, ruat coelum*), but certainly there was also a window high up in the west wall. The judges sat against the south wall just below the three kingly statues which looked down into the court from their canopied niches. All accounts make it a dismal place.

By the way it should be said that each of these Courts needed but one room. We are now sometimes driven into roundabout phrases by the double meaning of the word *Court*. We have to say that in Mr. Street's buildings the Court of Appeal has two courts, and the High Court of Justice some fifteen courts, and must then explain ourselves as meaning that certain rooms are used by certain judges for certain business. No such difficulty was there until recent days. The Court of King's Bench did not split itself up into sections, each of which wanted a place for itself. Each Court had its court and all its judges sat in a row. Sometimes there might be as many as eight, but gradually four became the fixed number for each Court of Common Law. Even in the Chancery it was only by degrees that the Master of the Rolls became an independent judge—formerly he was but an assessor of the Chancellor, and the Vice-Chancellors have but a very brief history. It may seem strange, but it is true, that there are hardly more judges in our new palace to-day than there were at Westminster in Henry the Sixth's time, while the amount of business to be done must have increased a hundredfold. Among the many explanations of this fact we may here remember that the

Courts then sat during a very small part of the year, and then only for three hours in the day—eight o'clock to eleven—and that it took the whole Court to decide any question of law. Also it may be remembered to the credit of the present age, that almost all the great changes which have made our procedure vastly different from that of the fifteenth century are the work of the last sixty years. Blackstone would be much more at home in the Court of King's Bench as it was under Edward the Fourth than in the High Court of Justice as it is under Queen Victoria. But we must go back to Westminster Hall.

The Exchequer buildings lay right and left of the hall's north doors and fronted New Palace Yard. Just inside that door there were staircases which led up to the main rooms of those buildings. The staircase on the left as one entered the hall was the way into the Receipt of the Exchequer. Here, down to recent days (a statute of William the Third gives us a good picture) they kept the king's treasure, which was also the national treasure, in a box with three locks; and they kept the national accounts by means of wooden tallies, the burning of which was some day to bring the old palace to the ground; and tellers and chamberlains, clerk of the pells and clerk of the pipe, performed, or were supposed to perform (for there were comforable sinecures in the Exchequer), the old duties in the old rude way according to the ancient course of the Exchequer very much the course known to Henry the Second. But now the ancient Exchequer has been supplanted by its offspring the all-regulating Treasury, and for the most part our modern financial system is very modern indeed. It is however but eight years ago that the Chancellor of the Exchequer ceased to be a judge, and to handsel his office by hearing a case for form's sake.

By these stairs, too, one came to other Courts, and to one of evil name—the Star Chamber; so called, says popular etymology, because the roof must have been adorned with stars; so called, thinks erudition, because in this part of the old Exchequer the Jews, not yet expelled from England, had to deposit their starra, or, as we might say, register their bills of sale, since *starrum* is excellent Anglo-Hebræo-Latin for a written bond or covenant.[4] However that may be, the Star Chamber of modern times, the chamber that was standing in 1834, seems to have been a room of Elizabeth's time, scarcely older therefore than the days which made it infamous. The other, the western staircase, led to the great Exchequer Chamber. Here the barons of the Exchequer sat as a Court of law. This room was sometimes called Elizabeth's Breakfasting Room; above were rooms known as the Tudor Nurseries, and below, rooms in which records might conveniently rot. The front to Palace Yard was seemingly of the Tudor time, but there was much older work within —arches in the earliest pointed style—says one who saw them in the present century. This is supported by a print which shows how the

[4] [See Holdsworth, H. E. L., i, 496.—Ed.]

sheriffs of London for 1811 were presented to the Court. It is a fine large room. Immediately below the judges' bench stands a great square table covered with a chequered cloth, a reminder of days when such a cloth (useful when money is to be counted) gave its name to the King's Exchequer. On the table lie the horseshoe, nails, and knives with which the City of London still pays rent to the king for certain lands, which, if we mistake not, it has long since ceased to hold—but mummery is immortal.

These Exchequer buildings stretched much further west than did the Courts which have just been demolished. Suppose yourself walking from Whitehall to the east end of Henry the Seventh's chapel, the route you now take was obstructed by these buildings, and to gain your end you would have had to pass down a narrow lane, St. Margaret's Lane, which by successive widenings became first St. Margaret's Street and afterwards the present broad thoroughfare. Somewhere in these buildings were the ancient tenements called Purgatory and Hell. At first they seem to be subterranean rooms under the Exchequer, some say under the hall, but in course of time the names are transferred to neighbouring taverns, and then we begin to hear of a Heaven also, and small wit makes merry. Very likely the king's debtors could once have told why certain cells near the Exchequer should have grim names. Some seventy years ago the keys of Hell were still in official keeping, and indeed it is nearly certain that Hell was a prison.

But George the Fourth came to the throne, and was to be crowned with more than ordinary splendour, the champion of England riding into the hall on a piebald horse obtained from Astley's amphitheatre, and so forth. This seems to have brought to an issue a long projected plan for removing from the Hall the King's Bench and the Chancery. Many designs for new Courts and new Houses of Parliament may yet be seen, for George the Fourth delighted in sumptuous buildings, and actually got built for himself a gorgeous approach to the House of Lords, a Scala Regia in the newest Grecian, or as some said Bœotian style. However, the more magnificent of these designs were not fulfilled, but it was decided that Sir John Soane should build new Law Courts along the western side of the hall. The undertaking was difficult, for there were buildings already upon the site. Along the north stood the Exchequer buildings, while further south was a building 'in the Roman style,' designed by Kent some time in the eighteenth century which provided a record office for the King's Bench and committee rooms for the House of Commons. It was decided to sacrifice the Exchequer Chamber and incorporate Kent's work, surely an unhappy choice.

Between 1820 and 1824 the work went on and Soane's new Courts projected into Palace Yard beyond the front of Westminster Hall. Then there was a storm in the House of Commons; a committee of taste was appointed, condemned this northward projection, insisted that it must be pulled down, and procured the substitution of that piece

of would-be Gothic with an octagonal tower at its north-west angle, which Londoners can hardly yet have forgotten. What we have known as the Law Courts was therefore a composite mass, one part, the southern considerably older than the rest. To this Soane added a new wing, while the most northerly part of all was tacked on at the bidding of the House of Commons. The internal arrangement was due to Soane, and few who remember the old rooms and now look back at the small area that they covered, and notice how that area is cut up into sections by the great buttresses of the Hall, will deny that the arrangement was clever. There were some subsequent rearrangements. Courts were made for the new Vice-Chancellors up many flights of stairs. Then, after an interval, the Chancery went off to Lincoln's Inn, where learned judges, as their numbers increased, could be accommodated with a turret or a shed. On the other hand, Probate and Divorce were brought to Westminster from the old Courts Christian in Doctors' Commons and elsewhere.

There was a very general outcry against the new Courts. The predecessors of the gentleman who last winter regretted aloud the accustomed conveniences of their old home, declared that home intolerable, and even threatened that they would not sit in it. There was no room for the bar, the press, the public; no libraries, no coffee rooms, no waiting place but the chilly hall. One open-mouthed critic denounced the judges' retiring room as 'ugly and gloomy like one of the infernal hells of the Spanish Inquisition.' Probably there was the same sort of fuss when the King's Court first left the fresh air to sit within walls; probably there will be the same sort of fuss when the next new law courts are built, and when we consider what human nature is it must be admitted that complaints of Mr. Street's work have indeed been both few and insignificant. Soane defended himself. The fault lay, he said, with the House of Commons, which had mutilated his design and even pulled down what he had built. Let us say no more of a controversy long since forgotten, save that Soane gave it as his opinion, and surely a sound opinion, that no building should abut on Westminster Hall. His courts are demolished; the side of the hall is open to view; may it remain so always.

Here we might end, but some acquaintance with books about Westminster Hall has borne in upon us that every writer who makes that hall his theme, is, or thinks himself, expected to paint some word-pictures in that vivid allusive style, which is now so fashionable and withal so cheap. A judicious reader knows that the inevitable passage beginning with 'Here Burke thundered and here Rufus supped' will come upon him sooner or later. But such flights are altogether beyond our powers, and if for the sake of conformity we mention a single scene, it shall be for the sake of one who played but a mute part in it, and of whom the historians of the hall have never a word to say, but who nevertheless, had of all men the best right to be remembered on the 4th of December,

1882. On the 21st February, 1764, in the old King's Bench Court, which was then in the south-east corner of the hall, John Wilkes was tried (he was not in court, but safe away in France) for publishing a seditious libel, No. 45 of the *North Briton*, tried before Lord Mansfield, Lord Chief Justice of England. On the same day the City of London was voting its freedom to Mansfield's great rival, the Chief Justice of the Common Pleas, Sir Charles Pratt, soon to be Lord Camden, for had he not been defending the liberties of the subject with copious eloquence? Altogether it was an exciting day in Westminster Hall, and the tide of popular admiration for Wilkes and Liberty was running high. But of Wilkes and his judges and his prosecutors nothing shall here be said; they are well known, and there was one in court who at the present moment is more memorable than any of them. Just below the bench were four seats on which Lord Mansfield suffered law students to sit, and to those students he would from time to time explain in his courteous way a few points of law. On this day one of these seats was filled, for almost the first time, by Jeremy Bentham, then aged sixteen. He was learning to admire Lord Mansfield, and even to write verse in his praise:—

'Hail, noble Mansfield! chief among the just,
The bad man's terror and the good man's trust.'

But he was to write prose in good time, prose of the most prosaic kind, and not in praise of Lord Mansfield or Lord Camden or any other judge or lawyer, but prose that would do more towards changing the whole aspect of English law than ever was written by any other; yet if we would see him in the home of English law we must look to no higher seat than this students' bench. He had for the greater part of his long life to preach to deaf ears, but gradually men came round to his opinions one by one. About a century after he seriously took up his pen, one of his larger projects was accomplished, and law and equity became one. Just half a century after he laid that pen down, a court which he would have called 'omnicompetent,' left Westminster Hall for a new home.

Perhaps a writer skilled in metaphors might give us some notion of what English law was like at the beginning of the present century, by comparing it to that pile of buildings over which we have cast our eyes. A comparison of this sort would not be very new, but still might be worth his making. We might be asked to notice how an architect employed to build law courts is hampered by old buildings. Here is an Exchequer chamber refronted in the Tudor time, but with pointed arches inside, there is a more modern building 'in the Roman style,' and one or both, fit emblems of Common Law and Equity, must be incorporated in the new work. Then there are those flying buttresses; these must at all hazard be retained, or the roof which Richard built for William's hall will collapse, and those buttresses will determine the ground plan of every court. The walls of that hall are themselves a history of English law. The core is old English rubble work, 'the rudest sort of rubble work laid nearly at random, and embedded in an

abundance of mortar'; it is cased with stone brought from Caen in Normandy, and repaired with stone brought recently from Bath. Open any window, cut any doorway, pull down any wainscot, and you may find some grotesque carving, battered statue, faded picture. Dig deep enough and you will lay bare, so it is said, the foundations wrought by the Confessor himself. All this must, if possible, be left as it is. You must not disturb the gorgeous royal staircase wherein your king delights, and the antiquaries will be wroth if you touch the ancient tenement called Hell. It is all wonderfully interesting, but very perplexing to one who has to build law courts.

As a matter of fact, however, our rulers had been ruthless with old buildings, tender with old laws. They would deface St. Stephen's chapel, but leave untouched the thousand absurd archaisms of which the laws were full. So judicial builders had, like Sir John Soane, to build where they could and how they could. They could not pull down so they had to evade. Perhaps a little room could be made under one of the flying buttresses, or a narrow passage carried round outside it. A very large part of the law was made up of fictions, the object of which was to circumvent rules which were once convenient but had long since become mere public nuisances. Of these things no account, not even the shortest, shall here be given; perhaps they are as well known as they deserve to be. But no one spoke against them, no one wrote against them, no one thought seriously about them. The buttresses had always been there, would always be there, were bulwarks of Church and State, of order and liberty, and therefore were to be circumvented as cleverly as might be. A new site was wanted, a site not incumbered by historical curiosities, interesting but obstructive.

The buildings that have just been pulled down at Westminster were used as Law Courts for just about sixty years, and the most eventful sixty years in the history of English law. It were hardly too much to say that within that short space of time the whole law has been re-fashioned. Not that changes are at an end—so much at least we may foretell, though we dare not say what those changes will be. But the debt incurred by a century and a half of neglect and indifference has been well-nigh paid; legislation has now rather to keep pace with national life than to overtake it. Thus the ceremony of last December may well mark an epoch. To the nation's irreparable loss that epoch has been but too plainly marked in a sadder way. Many must remember with regret that as the architect did not live to see the accomplishment of his grandest work, so while that work was nearing its completion, there passed away in quick succession one great judge after another, each of whom had laboured to make the law of England worthy of a well-ordered house built on a fair new plan, and that hardly had the new Courts been consecrated to the cause of sure and speedy and modern justice, by a few judgments of Sir George Jessel, before he also found in death that rest which in life he had never allowed himself if there was any work to be done.

WRITS AND BILLS

H. A. Hollond

I—Procedure by Original Writ Issued from the Chancery

'THE system of forms of action, or the writ system, is the most important characteristic of English medieval law, and it was not abolished until its piecemeal destruction in the nineteenth century.'[1] Maitland thus reminds us that we have to know a fair amount about forms of action in order to understand the modern law, and as forms of action were based on writs, we must know something about the writ.

The word 'writ' is the equivalent of the Latin '*breve*.' The two words refer to different aspects of the same thing, the English to the fact that it is in writing, the Latin to the fact that it is short and terse: these expressions acquired a specialized use, namely, that of denoting a letter addressed to some named person.[2] The word 'brief,' derived from *breve*, was used in the sense of letter in the seventeenth century, and *Brief* still means letter in modern German.

There is an Anglo-Saxon precursor of the word writ.[3] A document of 995—1005 records King Aethelred as sending his *gewrit* and his *insegel* to the archbishop and thanes in Kent, bidding them bring to agreement the parties in a suit.[4] This combination of words is the equivalent of the *breve et sigillum* frequently used in Domesday to describe the writs of Edward the Confessor and William in connexion with land transfers.

But, so far as we can tell, eleventh century letters to local magnates bidding them do justice between specified parties were rare. Most of the Conqueror's letters were letters notifying royal gifts of land and decisions, and so are those of William II, but the number of letters of precept or command seems to tend to increase in the latter's reign.[5]

The fundamental point in the early history of the writ, in its legal sense, is that which Maitland makes at the end of his first lecture on Forms of Action, namely, that in the eleventh and twelfth centuries

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[1] *Lectures on Forms of Action*, p. 1.

[2] Contrast the address to a named person of a writ with the address of an Anglo-Saxon charter, 'To all Archbishops, Bishops, Earls, Barons, etc.,' and with the address of letters patents, 'To all to whom these presents may come.'

[3] The words 'write' and 'writ' are of purely Teutonic origin. Skeat connects them with the German *reissen*, to tear, the derivation being from a root meaning to cut and so to engrave.

[4] This document is mentioned by W. H. Stevenson in Eng. Hist. Rev. 27, 5, citing *Codex Diplomaticus*, IV, 266, and Thorpe, *Diplomatarium Anglicum*, 302.

The very remarkable antiquary, Sir William Dugdale, in his *Origines Judiciales* (publ. 1666), cites this document as an early example of a writ under seal. P. 34.

I owe the reference to Stevenson's article, and much besides, to Professor Winfield's most useful *Chief Sources of English Legal History* (publ. 1925). See pp. 286—302.

[5] It is not possible to form any certain opinion as the number of surviving documents is small. They come from the archives of ecclesiastical houses. See Davis, *Regesta Regum Anglo-Normannorum*.

justice was not centralized, and that the writ was the means whereby the King's Court was drawing away business from the local Courts. 'The writ,' Professor Winfield has well said, 'has something of the reticence and all the directness that one associates with power. Under the Conqueror it was being linked up with the judicial process for enforcing it. The sheriff may be directed to restore seisin to an abbot and *justiciam tenere* if disseisors upset it.' The writ here referred to[6] begins with a greeting similar to that which is familiar in Glanvil,[7] except that the son of the earl is joined with the sheriff in the address. '*Willelmus rex Anglorum Ricardo filio Comitis et R. vicecomiti salutem!*' He informs them that he has made a grant of certain land to Saint Edmund and to Abbot Baldwin. He goes on, '*Praecipio etiam vobis duobus ut faciatis abbati Baldewyno justiciam de Petro de Valeynes et de illis hominibus qui sibi injusticiam fecerunt postquam mare transfretavi.*'

Within a century writs ordering the sheriff to take steps in connection with a law suit were frequent, and there were a number of common forms in the time of Henry II, as we see in Glanvil. These writs were called *brevia originalia*, original writs, because they originated the legal proceedings. This name distinguishes them from judicial writs, which were issued in the course of the proceedings. And the Chancery was in full working order as the office where the writs were drafted, and from which they were issued under the Great Seal.[8]

Obviously the resemblance between William I's writs and Henry II's is purely superficial. A writ issued in William's name implies that he had interested himself in the matter in question, and that the command was really his. But hundreds of writs must have been issued by Henry's Chancery of which he had never heard. They were part of the machinery of a judicial system which had already become far-reaching.

It was in the reign of Henry II that writs began to assume the character of formulæ appropriate to particular legal situations. By buying a particular writ the plaintiff acquired the right to have his claim tried in accordance with the rules pertaining to that writ, and the

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[6] The writ is one of William I's. It is printed by Davis, *op. cit.*, p. 129, No. XL.

[7] Ranulf Glanvil was a prominent statesman and soldier in the reign of Henry II, who defeated the Scots at Alnwick in 1174. He became Justiciar in 1180. The book *De Legibus et consuetudinibus Angliae* which is called after him, was, according to the accepted view, not written by him, but may have been written by his kinsman and secretary Hubert Walter, afterwards himself Justiciar and Chancellor. The probable date is between 1187 and 1189.

[8] There must have been an organization similar to the Chancery in Anglo-Saxon England. It is clear that by the time of Cnut the king's chaplains had become an influential secretrial body: they were rewarded for their services by appointment to bishoprics and abbeys.

Davis, *op. cit.*, XI—XV, says that the first man who is given the title *cancellarius* in a genuine charter is Regenbald, *circ.* 1060. But this charter and another calling Regenbald chancellor have recently been gravely suspected: Bulletin of *John Ryland's Library*, XX, 348 *ff.* I owe this reference to Professor Plucknett, who very kindly read this article in proof, and made valuable suggestions of which I have availed myself.

The words *cancellarius* and *cancellaria* are believed to be derived from the *cancelli*, or screen, behind which the clerks worked.

sum of those rules became a concept which lawyers later called a form of action.[9] Some of those writs were *brevia de cursu*, writs *of course*, which could be had for the asking on payment of the fixed price: others had to be bargained for. Thus a writ of debt, though Glanvil treats of it, and though it appears on the earliest plea rolls, is still in the first half of the thirteenth century a rare action, for which the King was entitled to ask a high price.[10] In the process of making new writs there was at this period a close liaison between the judges and the chancery. 'The chancery had not yet fallen so far apart from the courts of law that the justices could not get new writs made if they wanted them. In manuscript registers we find a group of new writs ascribed to William Raleigh who was for a while the foremost judge in the King's Court.'[11]

Then came the conflict between Henry III and the baronage. For some years Henry had attempted to govern without a chancellor or with a chancellor who was wholly subservient to himself, and complaints against new and unaccustomed writs grew loud. The prelates and barons insisted that there should be a chancellor sworn to issue no writs, save writs *of course*, without warrant from the baronial council.[12]

There followed the wise reign of Edward I, whose legislation in this matter, as in so many others, effected a reasonable compromise between conflicting points of view. This was expressed in the famous Chapter 24 of the Statute of Westminster II, often called after the words *In Consimili Casu*, which in English translation runs as follows: 'And whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case (*in consimili casu*) falling under like law and requiring like remedy is found none, the clerks of the Chancery shall agree in making the writ, or adjourn the plaintiff unto the next Parliament, and let the cases be written in which they cannot agree, and let them refer them unto the next Parliament, and by consent of men learned in the law a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants.'

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[9] Maitland wrote as follows in P. & M., I, at p. 151: 'Thus before the end of Henry's reign we must already begin to think of royal justice—and this is becoming by far the most important kind of justice—as consisting of many various commodities each of which is kept in a different receptacle. Between these the would-be litigant must make his choice; he must choose an appropriate writ, and with it an appropriate form of action. These wares are exposed for sale; perhaps some of them may already be had at fixed prices, for others a bargain must be struck. As yet the king is no mere vendor, he is a manufacturer and can make goods to order. The day has not yet come when the invention of new writs will be hampered by the claims of a parliament. But still in Glanvil's day the *officina justitiae* [workshop of justice] has already a considerable store of ready-made wares, and English law is already taking the form of a commentary on writs.'

[10] 'In the case of debts any royal writ . . . seems to be regarded as a luxury which the King is entitled to sell at a high price. Even in the earlier years of Henry III's reign the plaintiff must often promise the King a quarter or a third of all that he recovers before he will get his writ': P. & M. II, 205.

[11] P. & M. I, 196. Raleigh was appointed one of the justices of the bench in 1228, Bishop of Norwich, 1239, and later of Winchester, *d.* 1250.

[12] Provisions of Oxford, 1258: P. & M., I, 196; *H. E. L.*, I, 398.

The imposition of a limitation upon the power to create new writs involves the corollary that someone must have the right to question the validity of writs, and the power to quash those which do not satisfy the tests of orthodoxy. This power begins to be asserted by the judges in the thirteenth century,[13] and is exercised regularly throughout the Year Book period. The assumption of such power was furthered by the fact that a powerful and well-organized legal profession had grown up by this time, and that from henceforth the royal judges were always appointed from among successful counsel. And the conservatism of successful professionals in matters concerning their profession is notorious.

It is, perhaps, not commonly pointed out with sufficient emphasis how far the writ had travelled from the days of the Conqueror over two hundred years before. If William could have revisited the scenes of his exploits he would have been shocked to find the justices, the king's servants, quashing (or, to use the alternative expression, abating[14]) writs which were, after all, in form peremptory commands issued from the royal chancery in the King's name.

The growth of writs led to the formation of collections of precedents of writs for use by the chancery clerks and legal practitioners. They were not official,[15] any more than the Law Reports of the Incorporated Council of Law Reporting are official now, but they may be regarded as having a similar semi-official character. Judges constantly referred to *the* Register, but it is improbable that any one particular text could be regarded as the Register for the time being. Registers increased steadily in bulk, not from the creation of entirely new writs, but from the ever-growing adaptation of existing writs to new circumstances, particularly in respect of the writ of trespass. Their growth ended with the printing of a volume of original and judicial writs by William Rastell in 1531.[16]

The first point therefore to be noted about the writ is that it must correspond sufficiently closely with an established precedent to avoid the danger of being quashed by the judges. The second point is that the selection of the right writ was all-important. For the writ indicated the form of action chosen by the plaintiff, and each form of action implied

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[13] Referring to the reign of Edward I, Maitland wrote, 'It became apparent that to invent new remedies was to make new laws, and events were deciding that only in a parliament of the three estates could new laws be made: even when the King was concerned, the list of actions was to be a closed list.' '*Placita de Warranto*, 681, 686; writs brought by the King are quashed by the judges.' P. & M., I, 196. Professor Plucknett tells me that writs were in effect being quashed under John.

[14] *Abate*, French *battre*, beat down: *quash*, French *casser*, break; from Latin *quatere*, shake. Cp. French *Cour de Cassation*.

[15] For instance, some MSS. contain writs the efficiency of which cannot be guaranteed because they were never subjected in actual litigation to the test of judicial approval or disapproval: Winfield, *Chief Sources*, 299.

[16] For accounts of the Register, see Maitland, *Coll. Papers*, II, 110-73; and Winfield, *Chief Sources*, 286—302.

The Register was reprinted in 1595 and again in 1687. Maitland's opinion, based on what he calls a cursory examination of Rastell's book, was that the editions of 1595 and 1687 were almost exact reproductions of the 1531 book.

its own process, mode of pleading, of trial, and of judgment. Furthermore, however good a cause of action the plaintiff might have he would fail if he did not choose the right, or one of the right forms, and he would then have, as Maitland said, to take such comfort as he could from the hints of the judges that another form of action might have been more successful. 'The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen.'[17]

The third point is that there had to be a close correspondence between the text of the writ and the text of the plaintiff's declaration. In order to understand this statement it is necessary to say something about a medieval trial, which was very different from any with which we are familiar. The function of counsel in a modern trial is to examine and cross-examine the witnesses, and to address the Court upon the evidence and upon any doubtful questions of law. Before the case comes into Court much spade-work has been done. The lawyers have exchanged formal documents, each informing the other upon what allegations of fact he is going to rely. These documents are called the pleadings, and one of the first things which a pupil in common law chambers has to learn is how to draw them up. The name 'pleadings' is puzzling unless one knows something about the medieval procedure out of which the modern system was evolved.

The modern system would hardly have been possible during the middle ages, even if lawyers' minds had been ready for it, because of the non-existence of paper and the expense of parchment. So the reciprocal allegations, by which then, as now, the ground was cleared before the actual trial, were made *viva voce* in Court,[18] each allegation being called in Law French a *ple*. This word, which became the English 'plea' is the equivalent of the Latin *placitum*, the classical meaning of which is pleasing or agreeable, from *placere*, to please. The thought process by which the legal meaning of the word was arrived at is well illustrated by the opening sentence which counsel still constantly use, 'may it please your Lordship.'

The plaintiff's plea was called the *narratio* or *conte*,[19] in later English the declaration. The lawyer who made it was called at first a *narrator* or *conteur*, but soon acquired the name of 'serjeant,' the equivalent of *serviens ad legem*.

The defendant's serjeant would then either object to the plaintiff's plea as being for some reason faulty, or submit a plea of his own in answer.

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[17] Maitland, *F. A.*, 4.

[18] At one time this process of *viva voce* pleading was called the *loquela*. Stephen, Principles of Pleading, 5th ed., 23.

[19] The word *conte*, which in modern French means a story, is derived from *computare*. The English equivalent 'count' still survives in English legal language, denoting a particular charge in an indictment which contains several charges or counts. In later times serjeants became a class of superior counsel who had exclusive audience in the Common Pleas. And the importance of other counsel, at first called *apprenticii*, and later *barristers*, increased.

The Court and counsel spent much time arguing whether particular pleas were valid or not, for pleas were submitted tentatively, and if a plea did not stand the test of argument it would be withdrawn. Eventually the serjeant would have either to stand by or to abandon his plea. The object of this exchange of pleas was to arrive at a clear-cut question which, if of law would be decided by the Court, if of fact would be submitted to whatever method of proof the Court might award.[20] This question was called in Law French the *issue* from *issir*, Latin *exire*, to go out or emerge. Hence the common English word 'issue.'

By the end of the thirteenth century the other methods of proof had become comparatively rare, and it had become usual, when an issue of fact had been joined, for both parties to agree to 'place themselves upon the country,' '*ponere se super patriam*,' which means that they agreed to have the question decided by a jury. At this point the Year Book report ends. If one wants to discover how, if at all, the case was decided, one must search on the plea roll for the entry relating to that particular case. The procedure was that the Court issued a judicial writ *venire facias juratores* ordering the sheriff to empanel and return a jury. But various reasons might prevent the issue from ever being decided. 'The death of one of the parties may have abated the writ, the impossibility of getting jurors before the court may have led to the abandonment of the action, the parties may have grown weary of waiting and come to an agreement privately.'[21] Dr. Sayles tells us that only a small fraction of the cases reached final judgment, if we base our calculations upon the plea rolls of the King's Bench alone.

To return to the correspondence between writ and declaration, Bracton, writing of declarations in real actions, says that the declaration must be so framed that it shall accord with the writ, and that if the declaration does not accord with the writ the claimant loses, *quia non admittitur variatio*. But he goes on to say that if the statements in the writ and in the declaration are equivalent, though not identical in terms, the claimant is not on this account regarded as making a variation from his writ (*non propter hoc recedit a brevi suo*).[22] According to Reeves,

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[20] The award of a method of proof is commonly called by modern historians the medial judgment, in contrast to the final judgment. The expressions *issue en ley* and *issue en fet* occur as early as 1309, Y. B. 3 Edw. II, 59.

In Y. B. 30 Edw. I, Mich., Rolls Series, p. 16, counsel is reported to have said, 'Vous dites qe cel seygnourie a vous, etc, pur ceo qe vous estes seygnour, etc; ceo chet en destroit des justices: e la ou vous dites qe vous avez use, etc, ceo chet en pays, etc.' 'You say that this lordship is yours, because you are lord, this is for the decision of the justices; but so far as you say that you have made certain use of the land, this is a matter of fact for the jury.' Dr. Sayles gives the reference to this passage in SS. Vol. 57, ciii.

[21] The quotation is from Dr. Sayles' most interesting Introduction to Vol. II of his *Select Cases in the Court of King's Bench, temp.* Edw. I, at p. cvi. His selection of cases fills three volumes of the Selden Society, Nos. 55, 57 and 58, published in 1936, 1938 and 1939.

[22] The example which Bracton gives of a harmless difference of wording is that of the writ stating that the demandant claims two carucates of land which are worth annually ten pounds, while the declaration states, 'I claim ten librates of land.' A librate is a piece of land worth a pound a year, f. 431a.

On the other hand if a writ or detinue were brought for £20 and the declaration demanded £40 the variation would have been fatal. See *H. E. L.*, IX, 264.

the connection between writ and declaration became closer as time went on.[23] Before 1362 the declaration was in Law French, whereas the writ was in Latin. But 36 Edward III, stat. 1, c. 15, enacted that pleas pleaded in any Courts whatsoever, whether in the King's or other Courts, before the King's justices or others, should be pleaded, showed, defended, answered, debated, and judged in the English tongue. It was, however, added that they should be entered and enrolled in Latin: this was merely a continuation of the old practice. It seems unlikely that this statute was observed, certainly Law French remained for several centuries the written language of the law. But the fact that the pleadings (beginning with the declaration) were recorded in Latin involved the consequence that when oral pleadings fell into disuse and were replaced by written pleadings, the declaration was expressed in the form in which it would ultimately be entered on the plea roll, namely, in the Latin language and in the third person, following exactly the terms of the writ.[24] But it would be truer to say that the declaration followed exactly the form which the writ would have taken if it had been issued. For, as we shall see, original writs fell very much into disuse, and it became the practice in the great majority of cases for actions to be instituted by methods which did not involve an application to the Chancery office.

II—Procedure by (a) Bill of Complaint, and (b) Bill of Middlesex and Latitat in the King's Bench

Maitland's lectures on Forms of Action, which were not written for publication, sometimes assume more knowledge than most beginners would be likely to have. He truly said, 'The keynote of the form of action is struck by the original writ, the writ whereby the actions began. From of old the rule has been that no one can bring an action in the King's Courts of common law without the King's writ; we find this rule in Bracton—*Non potest quis sine brevi agere.*'[25] But he did not go on to warn the student that this statement ceased to be true in the century that followed Bracton. For during the Year Book period, although in the opinion of those best qualified to judge, most litigation

[23] Reeves, II, 620. John Reeves, born about 1752, became a fellow of Queen's College, Oxford, a member of the bar, a commissioner of bankruptcy, and, for two years (1791-2), chief justice of Newfoundland. He was appointed King's Printer by Pitt. *D. N. B.* He wrote a *History of the English Law to the end of the Reign of Elizabeth.* Reference is to the 3rd ed. by Finlason, 1869.

[24] The process by which the transformation of oral into written pleadings took place is a matter of conjecture. It is clear that in the sixteenth century the issue was arrived at by means of pleadings which were partly written and partly oral. The inrolment of pleas in Latin was abolished by statute in 1731. For further information, see the brief account of the history of pleading given in my article in the Cambridge Law Journal, 1936, 1—15, with references to Holdsworth, *H. E. L.*

[25] Bracton, f. 413b. Professor Plucknett is my authority for the statement that, while the Y. BB. lasted, most litigation was by writ.

But Maitland, in his article on the *Register of Original Writs* (Coll. Papers, II, 172), expressed the opinion that the Register of 1531 cannot be taken as fairly representing the law of that time. 'I should suppose,' he wrote, 'that the practice of bringing actions by bill without original writ checked the accumulation of new precedents in the Chancery.' There must therefore have been, in Maitland's view, a considerable use of the bill.

was by writ, there was an alternative process by bill. And in the vast majority of cases in the King's Bench during the three hundred years between the cessation of the Year Books in 1535 and the Uniformity of Process Act of 1832 no original writ was ever issued. Maitland does, indeed, refer to this matter in Lecture 7, but it may be surmised that, having completed the available number of lectures, he was not able to speak as fully as he would have wished. He alludes to the gradual process of formal decay which set in soon after the death of Edward I in 1307, and to the stage of evasory fiction, in which steps were dropped out of the procedure and merely replaced by the supposition that they had been taken. 'Thus,' he says, 'the original writ was omitted, unless error be brought upon the record, in which case the record must be duly made up.' And he tells us a little later, 'The King's Bench adopted the following fiction. Suppose for example that an action of debt is to be begun. First an action of trespass is begun and the defendant is arrested. He is thus in the custody of the marshal of the King's Bench and the Court has jurisdiction in cases against its prisoners. Then follows a declaration in "debt" by the plaintiff against the prisoner of the King's Bench.'

Maitland was here referring to the famous Bill of Middlesex, though he did not mention it by name. But his statement does not make it quite clear how completely fictional this particular procedure was. No writ of trespass was in fact issued, the defendant was not in normal cases arrested. He was deemed to have been arrested, he was deemed to be in custody, and a declaration was filed against him as if these events had really occurred.

What is meant by a bill? First, as to its derivation. This cannot be regarded as certain. The traditional one is from *bulla*, in classical Latin a boss or knob, whence a seal on a document, whence a Papal bull. But it is hard to imagine how a word denoting a seal, used in formal instruments, could have come to be used to denote the very informal documents which early bills were. Bolland suggested the derivation from *libelle* (*libellus*) which in its original sense meant (like the English 'book') a charter or sheet of parchment with writing on it. This is an attractive theory, but, I am told, linguistically most questionable.

Secondly, as to its meaning. In its early days it was not a technical word, any more than 'trespass' or 'seisin' were. Dr. Jenkinson has made an appropriate comparison between the medieval use of the word *bill* and the modern use of the word *chit*, which soldiers and civil servants have imported from India. 'It is anything which is short, informal; in contrast to the long or formal document which might have been employed for the same purpose.'[26] In the field of administration it is used in various connexions and with various meanings at every turn. In the field of law three uses of the word in the thirteenth century

[26] S. S., Vol. 48, cxxviii.

deserve mention. Two are in connexion with the *General Eyre*. This was a visitation of justices sent out, not under the limited commissions of *oyer* and *terminer*, and gaol delivery, which survive to the present time, but under a general commission to hold an *iter ad omnia placita*, for overhauling the work of the officials and Courts of counties since the last year.[27] On such occasions all persons of over fifteen years were expected to inform the justices of felonies known to have been committed: a writing preferring a charge of felony in these circumstances was called a *billa*.[28]

The second use also concerns the eyre. It denotes petitions presented to the justices of the eyre. Hundreds of such ' bills ' are preserved in the Public Record Office. The General Eyre having been discontinued in the fourteenth century, the existence of these bills was forgotten until they were discovered by Bolland early in the twentieth century. They consist of slips of parchment varying in size with the contents, some very narrow. The writing on almost all of them is in Anglo-French: often in the simplest, and sometimes in illiterate language. They make very various kinds of complaint and ask the justices for redress.[29] Holdsworth[30] thinks it probable that bills in eyre originated in the fact that when commissioners were appointed to hold the inquest of 1274, from the returns to which the Hundred Rolls were compiled, they were given instructions to hear *querelae*. Similar instructions were given to the justices in eyre from 1278 onwards.[31]

The third use of the word bill is that of an informal order issued by a Court in place of a formal writ. Dr. Jenkinson[32] tells us that such bills have survived in considerable numbers among the Exchequer writs of 35 Edward I, the only year in the reign of that King which, so far as is known at present, is represented by a really large survival of those records. He quotes one in which the word *billa* occurs in the text. It is an order issued to the sheriffs of London by the Exchequer, bidding them cause to be made out of certain goods and chattels of Adam of Rokeslie the sum of 6*s*. 11*d*. which Adam owes to Roger of Staunton, *ita quod denarios illos habeatis ad idem scaccarium Regis apud Westmonasterium hac instanti die lunae proxima ante festum sancti Lucae eidem Rogero solvendos et hanc billam :* (so that you have those moneys at the same exchequer of the King at Westminster on this instant Monday next before the Feast of St. Luke, to be paid to the same Roger, *and*

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27 See Bolland in S. S., Vol. 27, xxi—xxx, and Vol. 30, xi—xv.
Maitland tells us that the eyre was regarded as a sore burden, and quotes a record that in 1233 the men of Cornwall fled to the woods from fear of the justices: P. & M., I, 202.

28 The use of the word ' bill ' to denote a charge reminds one of its use in modern times when a Grand Jury was said to find a true bill against a person indicted at Assizes or Quarter Sessions.

29 See Bolland in S. S., Vol. 27, xxi—xxx, and Vol. 30, xi—xv.

30 *H. E. L.*, II, 336.

31 After the discontinuance of General Eyres in the first half of the fourteenth century the itinerant justices were given limited commissions only, and tried cases according to the strict procedure of the common law: *H. E. L.*, I, 272, 449.

32 S. S., Vol. 48, cxxx—cxxxi.

this bill). When we see a document of the kind called a bill in the early fourteenth century we are no longer surprised at the Bill of Middlesex of later centuries being so called. And in the familiar expression ' bill of exchange ' the word ' bill ' is used to denote a document containing an order to pay money.

Sir Matthew Hale wrote in the reign of Charles II, at a time when the competition between the King's Bench and Common Pleas for legal business was a pressing problem, a tract containing proposals for adjusting the conflicting claims.[33] He gives an account of the procedure in the two Courts, and before coming to the Bill of Middlesex refers to an obsolete procedure by bill in the second sense of the word, namely, complaint or petition. He writes that original suits in the King's Bench are of two sorts, either by original writ out of the chancery or by bill, *i.e.*, bill of complaint, and he divides the latter into suits by bill at large and suits by bill *ratione privilegii*. He says that suits by bill at large were frequent in ancient time and gives six illustrations, all from the reign of Edward III. One famous case, known to all students, the *Humber Ferry Case* of 1348 (not one of those cited by Hale), was a ' complaint by bill.'[34]

The King's Bench judges showed greater respect for the jurisdiction of the Common Pleas than their successors did in later centuries, for they did not entertain by bill at large any causes which could not have been instituted in the King's Bench by original writ. Among actions which did not lie in the King's Bench were real actions and actions of debt, detinue, account and covenant. Hale says that bills at large were used mostly for contempts, deceits and trespasses upon the case, but that they had fallen into disuse long before his time, having been superseded by bills of Middlesex and *latitats*.

Bills brought in the King's Bench *ratione privilegii* had a much wider scope than bills at large. For they lay in respect of *any* personal action, including debt, detinue, account and covenant. The privilege extended to actions by or against an officer of the King's Bench, but this privilege was of small importance compared with that relating to persons in the custody of the marshal of the King's Bench. If a person was in such custody any personal action would lie against him by bill. And by the middle of the fifteenth century it had been held that if a person who was liable to be taken into such custody had been let out on bail, this

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[33] Hale was both a very great judge and a pioneer in legal history. Accounts are given of him by Sir W. Holdsworth in *Some Makers of English Law*, and by Lord Birkenhead in *Fourteen English Judges*. His judicial career was from 1654 to his death in 1676. He did not publish this tract, entitled ' *Discourse concerning the courts of King's Bench and Common Pleas*,' and it was not printed until the learned Francis Hargrave in 1787 included it in his volume of *Law Tracts*, pp. 357-76.

[34] 22 *Liber Assisarum*, f. 94, pl. 41. It had been an old standing practice for the King's Bench and the Common Pleas to entertain *quarelae*. In view of the practice at the General Eyres, this is not surprising. More information on the subject will be available when the Selden Society publishes a promised volume of *Select Cases of Procedure without writ under Henry III*, by Mr. H. G. Richardson and Dr. G. O. Sayles.

circumstance entitled the King's Bench to entertain any personal action against him by bill. The law is thus stated by Coke in the seventeenth century in his *Fourth Institute, Concerning the Jurisdiction of the Courts.*[35] Writing of the King's Bench, he says, 'This court hath power to hold plea by bill for debt, detinue, covenant, promise, and all other personal actions, *ejectione firmae* and the like, against any that is *in custodia mareschalli*, or any officer, minister or clerk of the court.'[36]

These data provided the material for the fiction upon which the procedure by Bill of Middlesex was based. If A wished to bring a personal action, say of debt or covenant, in the King's Bench against B, he would begin by preferring a fictitious complaint of a trespass against B, and by asking the King's Bench to issue a writ to the sheriff of Middlesex (commonly called a Bill of Middlesex) ordering him to take, keep and produce B to answer the said complaint.[37]

But why the sheriff of Middlesex ? This question is not squarely put and met by either Hale or Blackstone.[38] But they both have something to say about it, which seems to amount to this, that the Court, being in Middlesex, could unquestionably entertain a bill of complaint of trespass preferred (without the issue of an original writ) against a defendant in Middlesex, and that once the Court had taken cognizance of the complaint, it could pursue the defendant into another county in which he might be found to be.[39]

If B was in Middlesex he would have to find bail for his appearance, and then, by virtue of being theoretically in the custody of the marshal, would be bound to answer a declaration in respect of A's true cause of action.

If B was not in Middlesex, the sheriff would return '*non est inventus*' (he has not been found). Then the Court would issue a writ of *latitat* (he lurks) to the sheriff of the county in which B was known to be. B would give bail and then, as in the preceding paragraph, would be deemed to be in the custody of the marshal, and bound to answer in respect of A's true cause of action without an original writ ever having been issued from the chancery.

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35 Coke died in 1634. The Fourth Part of his *Institutes* was posthumously published by order of the House of Commons in 1641.

36 P. 71. He gives as justification for the enlargement of the jurisdiction of the King's Bench the facts that the Common Pleas alone would not be able to despatch all the causes, and that as serjeants alone could practise in the Common Pleas, apprentices and other counsellors of law would not otherwise acquire the experience enabling them to be called as serjeants. P. 72.

37 The wording of the Bill of Middlesex is similar to that of the *capias*, which is explained later. See forms in Blackstone, III, Appendix III.

38 Blackstone, III, 285; Hale, in Hargrave's *Law Tracts*, 366.

39 In the seventeenth century the King's Bench could only entertain a bill of trespass if it was alleged to have been committed in the county in which the Court sat. This limitation did not exist in earlier times. The first example given by Hale of a suit by bill at large is one of 6 Edward III, a bill 'for a contempt committed in the county where the King's Bench sat.' But the second example, from 11 Edward III, is 'a suit by John Hened *per billam* for a trespass in a foreign county.' It is curious that these bills at large should have fallen into disuse.

In course of time the issuing of the writ to the sheriff of Middlesex was dispensed with (unless B was really in Middlesex). It was deemed that the writ to the sheriff of Middlesex had been issued, and that the return *non est inventus* had been received: the first real step taken was the issuing of a *latitat*.

The extent to which process by bill had ousted process by original writ in the seventeenth century is illustrated by the fact that, in his reports, Coke habitually records judgment for the defendant in the words ' it was adjudged *quod querens nihil caperet per billam*.'[40]

The writ of *latitat*, and the writ or bill addressed to the sheriff of Middlesex, if it was issued, were among those writs called judicial writs. They were issued on behalf of the king and in his name under the private seal of the Court of King's Bench, whereas original writs were issued from the Chancery under the Great Seal. Original writs bore the attestation *Teste meipso*, witness ourself, being professedly attested by the King: judicial writs bore the attestation of the Chief Justice.

One of the objects of proceedings by bill of Middlesex was to avoid the expense and the delay of an original writ. But it is surprising that the Chancery should have acquiesced in the resulting loss of revenue.

The subject was reviewed by the Common Law Commissioners of 1828 in their First Report.[41] They said that the bill of Middlesex and *latitat* were not only much cheaper than the original writ, but also free from many of its troublesome formalities. But they mentioned some cases in which it was necessary to procure an original writ, namely, actions against peers, corporations aggregate, or hundredors. It was also necessary if the plaintiff wished to proceed to a *distringas* against the defendant or to his outlawry.[42]

I must end this section with a statement which, though brief, is of fundamental importance. The fact that other methods of instituting an action were substituted for procedure by original writ issuing out of the chancery does not in any way conflict with the proposition that the writ is the keystone of the system of forms of action. Every action commenced by Bill of Middlesex or *latitat* was based on the assumption that a writ in the terms of the declaration would be obtainable if required

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[40] In a fourteenth century Year Book the Court is reported as saying ' et si agarde le court que vous ne preignez rien par votre breve ': Y. B., 16 Ed. II, 490 (cited Ames, *Lectures*, 75). The expression current in Coke's time is obviously derived from this, *billam* being substituted for *breve*.

[41] The Common Law Commission was appointed on May 16, 1828, in consequence of the great speech, lasting six hours, which Brougham made in the House of Commons on February 7, 1828, on the defects of the English legal system. The First Report was presented in February, 1829. The Chairman was Serjeant (afterwards Mr. Justice) J. B. Bosanquet; the other members were James Parke (afterwards Baron Parke and Lord Wensleydale) whom all would place among the greatest common lawyers of the nineteenth century, Edward Hall Alderson and John Patteson (afterwards judges of very great distinction), and Serjeant H. J. Stephen (who refused a judgeship because, it is said, of his disapproval of capital punishment). The latter wrote two famous works, a *Treatise on Pleading* and *Stephen's Commentaries*. To his work and influence the reports of the Commissioners were largely due.

[42] First Report, p. 82. There were various processes known by the name *distringas*. This one is explained later, pp. 27-8.

—indeed, it would some times be necessary to obtain it restrospectively —and the declaration was framed with reference to such a hypothetical writ. And the Court exercised the same control over the declaration in the action as it would have had over the declaration in an action commenced by original, disallowing it if it did not conform to the established principles of which the Register of Writs was the repository. The same is true of actions commenced by *capias* in the Common Pleas, or by *quominus* in the Exchequer. For this reason we need not be as surprised, as we otherwise might be, at the fact that the Register was twice reprinted after the use of original writs had become comparatively rare.[43]

III—Procedure by Capias in the Common Pleas

In order to understand the method whereby the Court of Common Pleas evaded the use of original writs it is necessary to know something about what Blackstone calls ' original process,' namely, the means of compelling the defendant to appear in Court.

First should be noted the difference between two of the classes of original writ set out in the Appendix to Maitland's Forms of Action. Both classes are addressed to the sheriff. One class has the initial words *praecipe X* (the defendant) *quod juste et sine dilatione reddat*,' to A (the plaintiff) such and such land, or money or chattels. The writ goes on to tell the sheriff that if X does not obey the order to deliver up the said property, and if A gives security, *fecerit te securum*, (*te* being the sheriff,[44]) for the prosecution of his claim, then the sheriff is to summon X by good summoners (officials of the sheriff) to appear before the justices. If X disobeyed the summons, A's next step was to obtain a writ of attachment (or *pone*) from the Court of Common Pleas. The words of the writ were *pone X pervadium et salvos plegios*, put X by gage and safe pledges.[45] This meant that the sheriff was to take some of his goods as a gage, to be forfeited,—or to make X find sureties, to be amerced —if X should fail to appear.

If after attachment X failed to appear he forfeited his security, and was also liable to have a writ of *distringas* issued against him. This

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[43] I mention for the sake of completeness, and not of its intrinsic importance, procedure by bill and summons against members of the House of Commons introduced by 12 & 13 Wm. III, c. 3, s. 2. The Commissioners explain this on p. 76 of their First Report. ' The bill of Middlesex and *latitat* in the King's Bench the *capias* in the Common Pleas, and the *quo minus* in the Exchequer, which all proceed either on a real or supposed apprehension of the Defendant's person, were considered as inapplicable to persons privileged from arrest. With respect to peers, lords of Parliament, and members of the House of Commons there was therefore no proper method of process but that by original writ; and it was to avoid the expense, delay, and other inconveniences attendant on this course, that the option of bill and summons in the case of persons having privilege of the House of Commons was thus afforded to the suitor.'

[44] This meant that the plaintiff was required to produce pledges of prosecution, who in course of time came to be the fictitious John Doe and Richard Roe.

[45] For the use of the word ' *ponere*,' to put, in this connection, compare the modern expression ' to put a person upon his honour.' There was another quite different writ of *pone* used for transferring certain actions from the County Court to the Common Pleas.

writ, also issuing from the Court of Common Pleas, was one commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, to be forfeited to the King if he did not appear.

But in the earliest days of the common law persons against whom an original writ of the *praecipe quod reddat* class was issued, were not subject to a writ of *capias ad respondendum* for the imprisonment of their persons.

The other class of original writs omitted the order to the sheriff to summon the defendant, and beginning with the words *si A fecerit te securum* ordered the sheriff forthwith to ' attach ' X.

This class of writs comprises two groups, on the one hand trespass *vi et armis*, in respect of wrongs committed by the application of direct physical force to the land, goods or person of the plaintiff, and on the other hand, trespass without *vi et armis*, the earliest and most important of the prototypes of those numerous forms of action which came to be called actions on the case, or simply ' case.'

There was an important distinction between the processes applicable to these two groups. If a defendant against whom a writ of trespass *vi et armis* was issued failed to appear upon the process of attachment, or had no substance whereby to be attached, a writ of *capias ad respondendum* could be issued against him subjecting him to imprisonment. This was not true of writs of trespass without *vi et armis*.[46]

The result of this distinction was the practice of suing out a writ of trespass *quare clausum fregit* (one of the forms of *trespass vi et armis*) upon an alleged trespass to land purely fictitious. This made the defendant subject to a *capias* if he failed to appear. It also brought him within the jurisdiction of the Common Pleas and enabled that Court to give leave for the plaintiff to proceed in respect of the real cause of action.

The fiction was then carried a step further by the Court of Common Pleas. It was supposed that a writ of trespass *quare clausum fregit* had been issued and that the sheriff had returned a *nihil*, *i.e.*, had reported that the defendant had nothing whereby he might be attached or distrained, and upon the basis of these fictitious suppositions a *capias* was issued by the Court.

Thus, the *capias* supplanted the original writ in the Common Pleas, except in the case of real actions. The Common Pleas had exclusive jurisdiction over real actions, and in respect of these the issue of an original writ was always essential. But this exception was not important for the use of the best known real actions,—those for the trial of title to freehold land, namely, the writ of right and the writs of entry—was

[46] Until 1504 when 19 Hen. VII, c. 9, made *capias* applicable to all actions on the case. *Capias* had previously been made applicable to actions of account by Stat. Westminster II, 1285, c. 11 (extending Stat. Marlborough, 1267, c. 23), and to actions of debt and detinue by 25 Edw. III, st. 5, c. 17.

superseded by the use of the action *de ejectione firmae*, commonly called ejectment.[47]

The *capias* remained in general use until it was swept away by the Uniformity of Process Act, 1832, based on the recommendations of the Common Law Commission.

It is obvious that the extension of the use of the *capias* made the lot of defendants much harder than it was originally. To meet this hardship the Common Pleas made an order in 24 Elizabeth that in all personal actions where the debt or damages claimed did not amount to £20, a defendant upon a *capias* should be admitted to common bail,—which was a mere formality, for it meant naming as securities the imaginary John Doe and Richard Roe. In personal actions of greater value, the defendant was to be admitted to special bail, which meant producing substantial sureties for his appearance.[48]

It is desirable to mention here a development due to a statute of Charles II, which though of purely antiquarian interest is fairly well known. In the tract previously mentioned, Hale wrote that the King's Bench had, by the Bill of Middlesex and other advantages, drawn practice from the Common Pleas, ' as well in those personal actions of debt, detinue, covenant and account, which seem peculiar to the Common Pleas, as in most other personal actions which were common both to Courts, as trespass and actions upon the case.' He represents section 2 of the statute 13 Car. II, st. 2, c. 2, as having been an expedient designed to redress the balance between the two Courts, and he must have known the facts, for he was Chief Baron of the Exchequer at the time.[49] The statute restricted the bail that could be required of any person arrested upon any writ, bill, or process issuing out of the King's Bench or Common Pleas, unless the certainty and true cause of action was particularly expressed therein.

This act, Hale wrote, ' rendered the *latitat* and the *clausum fregit* both insignificant, for men, being fond of good bail to their actions

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[47] Described by Maitland in *F. A.*, Lecture 5. Real actions were abolished in 1833 by 3 & 4 Wm. IV, c. 27, except two writs of dower and the writ of *quare impedit* relating to advowsons. So were mixed actions, except ejectment. ' Real,' ' personal ' and ' mixed ' as applied to actions, mean actions of which the result is the recovery of the thing, or of damage or of both respectively. Maitland said of this classification: ' I am not certain that it ever became correct to speak of ejectment as either real or mixed until the statute of 1833 abolished all real and mixed actions " except " ejectment and some others, thus speaking as though ejectment were either real or mixed. The truth is that this classification never fitted our law very well.' *F. A.*, 77.

[48] Blackstone, III, Ch. 19; Reeves, III, p. 758. It appears from Blackstone, III, 221, that in Charles II's time special bail could be demanded if the plaintiff made an affidavit that the cause of action amounted to £10 or upwards.

[49] Blackstone said that there was no intention on the part of the makers of the statute to oust the King's Bench from the jurisdiction which it had acquired. But the tract was not published till 1787. Blackstone therefore either had not read the tract in manuscript, or, if he had done so, had not noted Hale's statement.

The section certainly does not read like an attack on the King's Bench. It applies both to writs out of the King's Bench and to writs out of the Common Pleas. It is surprising that the section should have had as much effect, as it allowed bail up to £40 even if the cause of action was not stated. I cannot make the sentence on the subject on p. 221 of *H. E. L.*, Vol. I, tally with the section.

were in effect ousted of it by this act.' As to the other processes available in the two Courts, the advantage lay with the Common Pleas, and therefore ' the practice began to run thither, especially in actions of debt and trespass and actions upon the case, . . . and so by this means the Common Pleas relieved themselves in a great measure against the excess of practice in the King's Bench.'

The King's Bench met the statute by the device of adding to the Bill of Middlesex and *latitat* a clause, introduced by the words *ac etiam* (and also) setting out the substance of the real cause of action. Hale thought it arguable that this clause was legal in those actions over which the King's Bench would have jurisdiction without recourse to the privilege of the custody of the marshal, but that it was not legal in those actions over which it would not have jurisdiction without recourse to that privilege. He prepared a number of proposals for adjusting the balance between the two Courts, but did not publish his tract. In practice the *ac etiam* clause established itself and became common form.

The very obvious steps of adding an *ac etiam* clause to the Common Pleas' writ, *capias*, was taken a few years later on the advice of Sir Francis North (afterwards Lord Guilford), who was Chief Justice of that Court.[50] As to the balance between the two Courts, it continued to be very much in favour of the King's Bench.[51]

IV—Process in the Exchequer

The body which in Henry II's reign sat round the *scaccarium*,[52] or chequer-board, to check the accounts of the sheriffs, and otherwise

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[50] An account of the matter is given by Roger North in his *Lives of the Norths*, Vol. I.

[51] The personal ascendancy of Lord Mansfield, C.J.K.B. 1756 to 1788, increased the prestige of his Court in relation to the Common Pleas. The Chief Justiceship of the Common Pleas was often colloquially referred to as the cushion. But the list of those who held it in the eighteenth century is a distinguished one:—1701, Thomas Trevor (Lord Trevor); 1714, Peter King (Lord King); 1725, Robert Eyre; 1736, Thomas Reeve; 1737, John Willes; 1762, Charles Pratt (Lord Camden); 1766, John Eardley Wilmot; 1771, William de Grey (Lord Walsingham); 1780, Alexander Wedderburn (Lord Loughborough); 1793, James Eyre; 1799, John Scott (Lord Eldon).

The Common Law Commissioners, First Report, p. 11, gave the following figures, for the three Courts between 1823 and 1827 inclusive:—K. B., 281, 109 actions commenced; C. P., 80, 158; Exch., 37, 197.

[52] The medieval Latin word ' *scacci*,' chess-men, is derived from the Persian word *Shah*, a king. A *scaccarium* was a board or cloth divided into black and white squares like a chess-board. From these words are derived our words check, chequer and cheque as well as chess. The Norman *Curia Regis* sat for its financial business round a table covered with a chequered cloth, on which accounts were calculated by means of counters. It was about ten feet long and five broad, and was surrounded by a rim between three and four inches high, to prevent things from falling off it. Ref., Skeat, *Etym. Dict.*; Ducange, *Glossarium*; Camden, *Britannia*, ccliii.

Much information about the meetings *ad scaccarium* in Henry II's reign is available in the *Dialogus de Scaccario* written by Richard Fitz Neal, treasurer 1158 to 1198. Madox first printed it in his *History of the Exchequer* (1711), editing it from a thirteenth century MS. the *Red Book of the Exchequer*. Stubbs included it in his *Select Charters* (the 8th ed. was in 1895). In 1902 a more accurate text was published by Hughes, Crump and Johnson. Extracts from this text were included in the 9th ed. of Stubbs' *S. C.* by H. W. C. Davis.

For accounts of the *Dialogus*, see P. & M., I, 161, and R. L. Poole, *Exchequer in the Twelfth Century*.

superintend the King's finances, was not a specialized department. It was the *Curia Regis*, the governing body of the realm, acting its part in the sphere of finance. In the course of a century the character of the meetings changed. The chief justiciar and the chancellor ceased to attend. Certain men were appointed from among the King's clerks for permanent duty at the Exchequer.[53] These were described in official documents by the feudal designation of 'baron': in Maitland's words, they 'are sufficiently the peers of the barons of the realm to enable them to inflict amercements on noble offenders.' 'The treasurer,' Maitland continues, 'is the head of the Court whatever it may be doing. The position of the Chancellor of the exchequer is subordinate; he keeps the seal of the court, and his accounts may serve to check the treasurer's, but apparently the acts of the court are always attributable to the treasurer and the barons.'[54]

Thus had grown into being a department of government, with its own seal and records, which, by the end of the thirteenth century, had come to be called a *curia*.[55] It was a compound institution, in part a financial bureau, in part a judicial—or rather perhaps, an administrative —tribunal. Its main work was to collect the King's revenue, but if questions of fact or of law arose, it was its duty to judge impartially between the king and his subjects. And it was Edward I's practice, if petitioned in respect of money owed or land seized, to refer the petition to the treasurer and barons of the exchequer, in some cases telling them to associate with themselves the justices of the two benches.

There was what Maitland calls an irrepressible tendency at work for the Exchequer to usurp jurisdiction to adjudicate in personal actions between subject and subject. The persistent recourse to the Exchequer of plaintiffs who might have brought their claims in the King's Bench or Common Pleas, was due to the desire of creditors to obtain the advantage of some of the expeditious and stringent processes which had been devised for the collection of Crown debts.[56]

During the second half of the thirteenth century the volume of pleas entertained by the Exchequer grew considerably, and sometimes included cases which had no relation to the Crown's revenue. This may well have been due to a tradition surviving from the days before the meetings *ad scaccarium* had become differentiated from other meetings of the *Curia Regis*.

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53 An account of this matter is given by Tout on his *Place of Edward II in English History*, 334. In 1234 William of Beauchamp, Alexander of Swerford, and Richard of Montfichet were formally assigned as fellows of the other barons to be resident at the Exchequer. It was Swerford who began the compilation of the Red Book of the Exchequer: Winfield, 117. No other appointment is recorded until 1253 when that of Peter of Rivaux was enrolled on the close roll. From that time references to official barons became not uncommon.

54 P. & M., I, 191.

55 Fleta (*circa* 1290), p. 81: '*Habet etiam Rex curiam suam et justitiarios suos in scaccario apud Westmonasterium residentes.*'

56 In these paragraphs I have summarized pp. 191-3 of P. & M., Vol. I.

It appears that the assumption by the Exchequer of work beyond its proper province caused interference with the prompt performance of its financial duties, and frequent attempts were made in the reigns of Henry III and Edward I to arrest this tendency. Notably it was ordered in cap. 4 of *Articuli super Cartas*, 1300 A.D., that ' no common pleas shall be holden from henceforth in the Exchequer, contrary to the form of the Great Charter.'[57]

But in the long run the law triumphed over finance. The Exchequer of Pleas, as it was called, broke away from the Treasury. The barons of the Exchequer ceased to be accountants and became pure lawyers, appointed like other judges from among successful advocates. And they built up for themselves an extensive jurisdiction over personal actions by countenancing a sheer fiction.

This fiction has as its basis the rule that, if A is the King's debtor, the King can take steps to collect a debt which B. owes to A. The early existence of this rule is shown by the last sentence in a passage from the book called *Britton*, written about 1290.

Ausi volums nous, qe a nos Eschekers a Westmoster et aylours eynt nos Thresorers et nos Barouns illucs jurisdicioun et record des choses qe touchent lour office, et a oyer et terminer totes les causes qe touchent nos dettes et nos feez, et les incidentes choses sauntz les queles tieles choses ne porount estre tryez; et qe il (s) eynt poer a conustre des dettes qe hom deit a nos dettours, parount nous peusoms le plus tost aprocher al nostre.[58]

' Also our will is, that at our Exchequer at Westminster and elsewhere our Treasurers and our Barons there have jurisdiction and record of things which concern their office, and to hear and determine all causes relating to our debts and fees, and things incident thereto without which such matters could not be tried; and that they have power to take cognizance of debts which a man owes to our debtors, whereby we may be able most speedily to recover our own.'

The course of development from that starting point is as follows: At first the King as joint plaintiff with A proceeds against A's debtor, B, in the Exchequer.[59] The next stage is when the King no longer appears as joint plaintiff, but when A appears as plaintiff, and justifies his action by telling the Court that he requires to collect B's debt in order to pay the debt which he (A) owes to the King. Finally, comes a day when some person A, not being the King's debtor, but nevertheless wishing to proceed against B in the Exchequer, falsely tells the Court that he is the King's debtor, and the Court, in its zeal to enlarge its jurisdiction

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[57] All that is known about the work of the Exchequer on its judicial side in the thirteenth century is to be found in the valuable introduction to S. S., Vol. 48, Select Cases in the Exchequer of Pleas, edited by Hilary Jenkinson and Beryl Formoy.

[58] Britton, Liv., I, c. 1, s. 9, ed. F. M. Nichols, 1865.

[59] A number of cases in which B was attached to answer *Regi una cum A* (to the King together with A) are printed in S. S., Vol. 48. See Introduction, c—cii.

refrains from taking notice of the falseness of an allegation which it knows to be untrue, and allows the action to proceed.

The writ containing the allegation that the plaintiff was the King's debtor and was being hindered by the defendant's default from paying his debt to the King was called a *Quo minus*, because the Latin text contained those words. In its fully developed form it ran, 'Rex vicecomiti salutem. Praecipimus tibi quod capias B ubicunque inventus fuerit . . . ad respondendum A debitori nostro de placito transgressionis quo minus idem A nobis satisfacere valet . . .'[60] In 1731 it was enacted that all writs, pleadings and records should be in the English language only.[61] Consequently, when Blackstone was lecturing, the writ was in English, so the form quoted by him runs as follows: 'George the Second, by the grace of God of Great Britain, France and Ireland King, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take B . . ., wheresoever he shall be found in your bailwick and him safely keep, so that you may have his body before the barons of our Exchequer at Westminster, on the morrow of the Holy Trinity, to answer A, our debtor, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, *whereby he is the less able to satisfy us the debts which he owes us at our said exchequer;* as he saith he can reasonably show that the same he ought to render: and have you there this writ. Witness Sir Thomas Parker, knight, at Westminster, the sixth day of May, in the twenty eighth year of our reign.'[62]

The jurisdiction of the Exchequer in ordinary personal actions, being thus based upon an usurpation, was entirely outside the scope of original writs issuing out of the Chancery. The *quo minus* was, as the attestation in the writ shows, issued out of the Exchequer. It was by purchasing such a writ that an action in the Exchequer was normally instituted. But if the defendant was a person privileged by being an accountant to

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60 This quotation is from a writ of Charles I's reign given by Burton in his *Practice of the Office of Pleas in the Court of Exchequer* (publ. 1791), II, 475.

It may be regarded as certain that no *quo minus* formula had come into use in the thirteenth century, for Dr. Jenkinson tells us that he had looked for any trace of it in vain: S. S., Vol. 48, c—cii. But Burton, I, 105, gives three examples from the year 1329. One of them runs, *Quo minus rex percipere potest debita in quibus B ei tenebatur.* In 1400 a writ containing a formula of that kind was called a *quo minus*, for in Y. B., 2 Hen. IV, Mich. pl. 48, Markham is reported as saying, '*Jeo avera le quo minus.*'

Professor Plucknett states, in his *Concise History of the Common Law*, 3rd ed., p. 147, that the fiction of pretending to be a Crown debtor appears in the middle of the fourteenth century. I have discussed this passage with him, and he allows me to state that he agrees with me that there is not at present available any evidence as to when this fiction was admitted by the Court. There is a remarkable silence on the subject, apparently neither Coke nor Hale mentions it. It may be regarded as certain that the *quo minus* allegation had become a pure fiction before the reign of Elizabeth, when the status of the barons was raised.

61 4 Geo. II, c. 26.

62 Blackstone, III, Appendix III, § 4. Sir Thomas Parker was Chief Baron from 1742 to 1772. Blackstone began lecturing in 1753 in George II's reign: the first edition of his *Commentaries* was in 1765-9, in George III's reign.

the King or an officer of the Court, or otherwise, the suit was instituted by bill, that is to say, a bill of complaint.[63]

The object of the *quo minus*, like the object of the Bill of Middlesex, *latitat*, and *capias*, was to bring the defendant within the jurisdiction of the Court. Once he was within that jurisdiction the plaintiff could file a declaration in respect of his true cause of action. We have seen that, in consequence of the statute of Charles II previously referred to, it become usual for the true cause of action to be stated in the Bill of Middlesex, *latitat* or *capias* by means of an *ac etiam* clause. Sir William Holdsworth tells us that in 1692-3 a bill was brought forward to compel a plaintiff in the Exchequer to express the true cause of action in his writ, but that it was dropped after its first reading.[64]

Until the middle of Elizabeth's reign the status of the barons of the Exchequer was inferior to that of the judges of the King's Bench and Common Pleas, and the barons did not go the circuits. But in 1579 there was a departure from precedent, for, as Dugdale records,[65] when Robert Shute was appointed second baron, his patent declared that he should be of the same order, rank, estimation, dignity and pre-eminence to all intents and purposes as any puisne judge of the two other Courts. And thereafter the barons were treated as the equals of the judges. But it cannot be said that the office of Chief Baron equalled the Chief Justiceships in prestige until the nineteenth century. For in the eighteenth century it was not considered worthy of acceptance by the most ambitious lawyers.[66] And the Exchequer always had by far the smallest share of common law business: at the time of the Common Law Commission the number of actions commenced in it was less than half the number commenced in the Common Pleas.[67]

V—The Uniformity of Process Act, 1832

It will be convenient to close this sketch with a statement of the basic provisions of the Act for Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster, 1832, 2 William IV, cap. 39, which was passed in pursuance of the recommendations of the Common Law Commission.

Whereas previously all writs instituting an action had been addressed to the sheriff, this Act introduced the device of a writ of summons addressed

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[63] The authority for this is a statement made by John Walter, Chief Baron 1625-30, in an Exchequer case. It is quoted by Salkeld, an early eighteenth century reporter, on p. 546 of Vol. II of his Reports. It does not appear from what source he obtained it. The reason for the distinction is:—the object of the *quo minus* was to bring the defendant within the jurisdiction of the Court, but if the defendant was an accountant to the King or an officer of the Court he was already within the jurisdiction, and so could be proceeded against by bill.

[64] *H. E. L.*, I, 240.

[65] *Chronica Series*, 94 (appended to his *Origines Judiciales*).

[66] In the eighteenth century, when the creation of peerages was lavish, no Chief Baron was of sufficient distinction to receive that honour. But in 1831 Lord Lyndhurst, who had been Lord Chancellor for three years, did not consider it beneath his dignity to accept the post of Chief Baron.

[67] *Supra*, p. 30, note 51.

to the defendant himself. After reciting that 'the process for the commencement of personal actions in His Majesty's Superior Courts of Law at Westminster is by reason of its great variety and multiplicity very inconvenient in practice,' it enacted that in all actions commenced in either of the said Courts, (meaning the King's Bench, Common Pleas and Exchequer,) where it was not intended to hold the defendant to special bail, the process should be a writ of summons, in prescribed form, issuing out of the Court concerned.

The writ was to be 'tested' in the name of the Lord Chief Justice or Lord Chief Baron of the Court from which it issued, or in case of a vacancy of such office, then in the name of a senior puisne judge of the said Court. The form was as follows:

William the Fourth, etc. . . . to X of, etc., in the County of —— Greeting: We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our Court on . . . . in an action on . . . at the suit of A. And take notice, that, in default of you so doing, the said A may cause appearance to be entered for you, and proceed therein to judgment and execution.

Witness . . . at Westminster the . . . day of . . .[68]

The exception applicable to special bail cases disappeared when the Debtor's Act, 1869, enacted that thereafter a person should not be arrested upon mesne process in any action.[69] In 1879 the Uniformity of Process Act, having been superseded by the modern rules of procedure, was repealed by the Civil Procedure Acts Repeal Act, together with a great many other statutes and parts of statutes. It was this Act which abolished the long obsolete process of outlawry in civil proceedings.[70]

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[68] If the action was one in which it was intended to hold the defendant to special bail, then the writ (to be issued out of the Court concerned) was to be a writ of *capias* addressed to the sheriff.

[69] It was, however, provided that a plaintiff having a good cause of action for £50 or more could apply to a judge for the arrest of the defendant if the latter was about to leave England and did not give the prescribed security. The rules governing such applications are contained in Order LIX. of the Rules of the Supreme Court.

[70] Blackstone gives an account of the procedure in III, 283-4. He says that in order to proceed to outlawry it was essential that the action should have been commenced by original writ, and not by bill.

TRUSTS AND TITLES

S. J. Bailey

THE outstanding characteristic of all equitable interests in property is that they do not affect a purchaser who, without notice of their existence, acquires a legal estate in that property in good faith and for value. This rule is of respectable antiquity,[1] and still holds good.[2] As is well known, however, a doctrine of *constructive* notice was developed by Courts of Equity, whereby purchasers are deemed to have notice of the existence of an equitable interest if they unjustifiably omit to make some enquiry or to inspect some deed which would have revealed it.[3] The consequence of this doctrine was that a purchaser of land, which was subject to equitable interests, was seldom able to say that he purchased without notice of them.[4]

Although a purchaser, acquiring a legal estate for value, is unaffected by equitable interests if he purchases without notice of their existence, the converse proposition—namely, that they bind him if he acquires the estate with notice of them—is subject to an important qualification. More than a century ago, it became customary, when creating trusts of land, to give the trustees express authority to sell (and possibly to lease or mortgage) the land.[5] If they duly exercised that authority, the purchaser was not affected by their trusts, whether he took with

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[1] Fonblanque, Treatise of Equity (1794), ii., 151: 'where a man is a purchaser [of the legal estate] for valuable consideration, without notice, he shall not be annoyed in equity.' The rule existed even in the sixteenth century: Holdsworth, History of English Law, iv., 432.

[2] Those provisions of the Land Charges Act, 1925, which require certain equitable interests to be registered, are made to conform with the rule: see Law of Property Act, 1925, ss. 198 (1), 199 (1) (i).

[3] *Ware* v. *Lord Egmont* (1854) 4 D. M. & G. 460, 473.

[4] By the middle of the nineteenth century eminent judges were insisting that the doctrine ought not to be further extended: *ibid.* The Conveyancing Act, 1882, s. 3, accordingly stated its existing scope in a form designed to prevent its extension: *Bailey* v. *Barnes* [1894] 1 Ch. 25, 35. Section 199 (1) (ii) of L. P. A., 1925, is expressed in a similar restrictive fashion.

[5] This type of power, designed to enable a legal owner of land to dispose of it free from equitable interests affecting it, was first employed in the eighteenth century in mortgages of land. It was settled by the end of that century that a legal mortgagee, having such a power, could dispose of the land free from the mortgagor's equity of redemption: see Holdsworth, 7 H. E. L., 160—161. Similar overreaching powers (by way of power or trust to sell) given to *trustees* of land became common by the end of that century. These were originally employed mainly, if not exclusively, in devises of realty to executors (in the days when realty did not devolve upon executors as such) in order that its proceeds of sale might assist the testator's personal estate in the payment of his debts and legacies. Settlements *inter vivos* by way of trust for sale did not become common until the middle of the nineteenth century: see J. M. Lightwood, 'Trusts for Sale,' 3 Cambridge Law Journal, 59; Butler's notes, 231, § iii, 4. to Co. Litt. f. 271b, and 249, § xii, to Co. Litt. 290b; Cases and Opinions (1791), II., 114—115. Compare 'bare' powers (unattached to a legal estate), which are much older: see *post*, notes [9]—[12].

notice of them or not.[6] Thus, it came to pass that the most common kind of equitable interest in land—the beneficial interest under a trust—rarely affected a purchaser, even if he knew of its existence, so long as the selling trustees duly observed the terms of their authorization.[7] Evidently, therefore, statements commonly made or implied in text-books, to the effect that a purchaser of property having notice of equitable interests affecting it is bound by them, are misleading unless they except a purchaser who acquires the property from a legal owner duly exercising an authority to overreach the equitable interests in question.[8]

It would seem that this practice, of conferring upon trustees authority to overreach the equitable interests under their trust, was born in an unfortunate environment. First, there was already an immense amount of conveyancing law about a somewhat similar practice, long established, of including in settlements and wills of land express powers of sale (and of leasing, exchange, etc.).[9] A purchaser of the land from the so-called 'trustees' of such a power would, if all was well, acquire the land free from the various interests (for life, in tail, etc.) which the will or settlement had created; and the fact that those interests were commonly *legal* interests in no wise restricted the overreaching effects of the sale.[10] This type of power, however, was what may be termed a bare power; for as a rule the so-called 'trustees' in whom it was vested had not themselves any estate or interest in the land.[11] Consequently, unlike trustees who hold a legal estate on trust and can therefore at least convey that, they could convey nothing whatever unless they observed strictly the limits (expressed or attached by law) of the authority which

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[6] 'Any person who takes from one whom he knows to be the trustee of a will, otherwise than under a conveyance or transfer authorized by the trusts or powers thereof, property which he knows to be part of the trust estate, takes such property subject to all the trusts and equities to which it was subject in the hands of the trustee as such': *per* Joyce J., *Perham* v. *Kempster* [1907] 1 Ch. 373, 380. See also *Re Langmead's Trusts* (1855) 20 Beav. 20, 25; *Re Bourne* [1906] 1 Ch. 113, 119; *Re Baker and Selmon's Contract* [1907] 1 Ch. 238, 242; *Re Atkinson and Horsell's Contract* [1912] 2 Ch. 1, 11; Williams, Vendors and Purchasers, 3rd ed., i., 224—225, 577.

[7] Precisely the same principle applied to the express powers of sale formerly contained in mortgage deeds (*ante*, note [5]). See Sugden, Vendors and Purchasers, 14th ed., 60; *Selwyn* v. *Garfit* (1888) 38 Ch. D. 273; and especially *Re Harwood* (1887) 35 Ch. D. 470, *per* Cotton L.J. at p. 472 (as to how these powers operate).

[8] Williams, *op. cit.*, i., 224—225, 241, 577. A second exception occurs where the selling trustee makes title with the concurrence of the beneficiaries: *ibid.* 224—225, 241, 577. See, further, *post*, p. 40. The original practice was to require their concurrence n every case, in order to secure from them full covenants for title: Vaizey, Settlements (1887), i., 291; Williams, *op. cit.*, 69; cf. note [28], *post*.

[9] Holdsworth, 7 H. E. L., 156. The leading authority on this type of power was Sugden (subsequently Lord St. Leonards) on Powers, first published in 1808: references here are to the 8th ed., dated 1861.

[10] This type of power operated under the Statute of Uses. Its overreaching effect was achieved by expressly or impliedly revoking the uses of the original will or settlement and by appointing in their stead a use in favour of the purchaser: Holdsworth, *op. cit.*, 157. It was ultimately decided that such powers impliedly carried the necessary power of revocation, and that their exercise automatically revoked the former uses: Sanders, Uses and Trusts, 5th ed., 487 n.; Sugden, Powers, 8th ed., 290, 837.

[11] That they were customarily called 'trustees' of the power, though holding no estate upon trust, makes it hard to tell when Sugden is alluding to bare powers and when to a trustee of land. See Sugden, *op. cit.*, 102, to the effect that all powers are mere declarations of trust—meaning, no doubt, that they are in a sense fiduciary.

the will or settlement had given them.[12] Secondly, it was a time when Courts of Equity, having primarily in mind the security and protection of the equitable interest and its owner, had not yet fully realised that severe and complicated rules (as to constructive notice and the like), which deter prospective purchasers, are undesirable, in that they tend to render unmarketable both trust land and land in general.[13]

Under these influences, the Court of Chancery dealt very strictly with trustees of a legal estate, empowered by their trust to sell it. They were required to obtain the best price reasonably obtainable, to insert no depreciatory conditions in the contract of sale, to obtain any preliminary consents prescribed by the trust, to sell (if at all) before their power lapsed, and to apply the proceeds of sale in the manner directed by their trust. If they failed in any one of these respects, they committed a breach of trust; and their purchaser, if he had actual or constructive notice of their breach of duty,[14] took the land with the equitable interests still attached to it. Although the requirements as to price, depreciatory conditions, and due application of the proceeds of sale,[15] were eventually negatived to some extent, so far as the purchaser was concerned,[16] by inserting special provisions in the settlement itself or by statute, purchasers remained in anxiety lest some necessary consent had not been obtained by the selling trustees, or lest the selling power had

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[12] The difficulty was that the Courts were prone to construe the power (express or implied) to revoke the former uses, as *conditional upon* the due observance of the expressed or presumed intentions of the settlor. Conveyancers attempted to evade this difficulty by framing powers which would carry the title to a purchaser nonetheless: Sugden, *op. cit.*, 851—855; Perry, Trusts and Trustees, 7th ed., ii, ch. XXVI, § 789. Cf. trustees holding a legal estate, who could at least convey that: *ibid.*; *Robinson* v. *Briggs* (1853) 1 Sm. & Giff. 188, 218.

[13] See Butler's note 249, § XII, to Co. Litt. 290b, written at the close of the eighteenth century. He ooncludes that it might have been preferable if 'the operation and consequences of trusts had been confined to the trustee and *cestui que trust*.' Also Vaizey, Settlements (1887), ii., 1410—1411.

[14] Ashburner, Equity (1902), 185—186; Story, Equity Jurisprudence, 14th ed., ii., 661 n.; *Boursot* v. *Savage* (1866) 2 Eq. 134 (notice of required consents—purchaser ordered to re-convey); *Robinson* v. *Briggs* (1853) 1 Sm. & Giff. 188 (constructive notice of intent to misapply proceeds of sale); *Re Cooper and Allen's Contract* (1876) 4 Ch. D. 802, 818; *Dunn* v. *Flood* (1885) 28 Ch. D. 586, 595. See also Sugden, Vendors and Purchasers, 14th ed., 62; Godefroi, Trusts, 3rd ed., 419—420, 427, 445.

[15] *Best price :* Sugden, Powers, 8th ed., 863; Sugden, Vendors and Purchasers, 14th ed., 60; see now Settled Land Act, 1925, s. 110 (1), but query whether it applies to trustees for sale. *Depreciatory conditions :* Godefroi, Trusts, 3rd ed., 426-7; Williams, Vendors and Purchasers, 3rd ed., i., 249—251; see now Trustee Act, 1925, s. 13. *Application of proceeds :* the rule of Equity was approximately that a purchaser was bound to see to the due application of the proceeds unless the settlement exonerated him expressly (*i.e.*, trustees' receipt to be a good discharge) or by implication (*e.g.*, where, as for payment of debts, he could not have been expected to know and supervise their due application): see, *e.g.*, Butler's note 249, § XII, to Co. Litt. 290b; Booth, Cases and Opinions, ii., 114—115; Fonblanque, Equity, ii., 151—154; Sugden, Powers, 8th ed., 855; Vaizey, Settlements, ii., 1409—1411; Godefroi, *op. cit.*, 443—445. See now L. P. A., 1925, s. 27; Trustee Act, 1925, s. 14.

[16] Such provisions did not protect a purchaser who acted in collusion with the trustee or was aware of an intended breach of duty: *Re Bourne* [1906] 1 Ch. 113, 119 (intent to misapply proceeds); Sugden, Vendors and Purchasers, 14th ed., 661; or who had notice, actual or constructive, that the sale was a breach of trust: Godefroi, *op. cit.*, 445. *Semble*, notice of intent to misapply is perhaps now irrelevant (neither L. P. A., 1925, s. 27, nor T. A., 1925, s. 14, seems to prescribe good faith), as also are depreciatory conditions in the absence of collusion (T. A., 1925, s. 13).

ceased or had never existed;[17] and modern legislation has not entirely removed such causes of anxiety.[18]

These overreaching powers, conferred upon trustees holding a legal estate upon trust, were either mere *powers* to sell at their discretion or were expressed as a *trust* (*i.e.*, duty) to sell. So far as concerned their overreaching ability to free the estate from its trusts in favour of a purchaser,[19] and the theory upon which they achieved this result,[20] there was no practical purpose in distinguishing the one from the other. Indeed, there are many passages, in text-books and judgments, in which the terms 'power of sale' and 'trust for sale' appear to have been used interchangeably.[21] The real importance of the distinction lay chiefly, it would seem, (i) in the operation of the rule against perpetuities,[22] (ii) in the question whether the trustees were bound to sell within some particular time,[23] (iii) in the fact that a trust for sale effects, in equity, a notional conversion of the equitable interests,[24] and (iv) in the question

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[17] *Prescribed consents :* Sugden, Powers, 8th ed., 252; Williams, *op. cit.*, i., 577—578; *Mortlock* v. *Buller* (1804) 10 Ves. Jun. 292, 308—309 (sale without prescribed consents is a breach of trust); *Boursot* v. *Savage* (1866) 2 Eq. 134 (purchaser with actual or constructive notice of this takes subject to the trusts). *Authority to sell :* depends on true construction of the settlement: *Re Pope's Contract* [1911] 2 Ch. 442 (implied from implied power to vary investments); if not subsisting at date of sale, purchaser with notice of trust ordinarily takes subject to it: *Perham* v. *Kempster* [1907] 1 Ch. 373, 380.

[18] *E.g., Prescribed consents :* L. P. A., 1925, s. 26, protects purchaser against those prescribed by the 'disposition' (but not against any prescribed by a separate trust instrument) if at least two are obtained. *Duration of authority to sell :* L. P. A., 1925, s. 23 (formerly C. A., 1911, s. 10), protecting purchaser until land conveyed to or under direction of beneficiaries, goes little further than the previous case law (note [25], *post*); see Godefroi, Trusts, 3rd ed., 440; 2 Key & Elphinstone, Conveyancing Precedents, 14th ed., 547 (where 'continued' should perhaps read 'elected'). *Powers to postpone sale :* L. P. A., 1925, s. 25 (2), perhaps protects him when they lapse: cf. note [25], *post ;* Williams, Vendors and Purchasers, 3rd ed., i., 245—246. See, further, notes [15], [16], above. For a new cause of anxiety, introduced by the Acts of 1925, see notes [32], [71], *post.*

[19] Williams, *op. cit.*, i., 224—225, 241, 577; also note [21], *post.*

[20] The trustee effectively conveys the legal estate because it is vested in him; the beneficial interest because his authority to sell is an authority to detach from the land the equitable interests of his beneficiaries: *Re Harwood* (1887) 35 Ch. D. 470, 472 (*re* analogous power of legal mortgagee—cf. note [7], *ante*). But the power to give effective receipts and the purchaser's alternative responsibility for due application of the money were so strongly emphasized by Courts and text-books that these came to be regarded as a question of title: this was thought to be justified by saying (*pace* the doctrine of conversion—*post*, note [24]) that in Equity the *cestuis que trust* own the land and so *prima facie* their interests in it stand until they receive the proceeds of sale: Butler's note 249, § XII, to Co. Litt. 290b; Perry, Trusts and Trustees, 7th ed., § 790. No doubt the evil influence was the false analogy of the bare power (*ante*, note [12]). On principle, one would have expected every duly authorized sale to transfer the trusts from the land to the purchase-money; and any equitable duty on the purchaser, to see to its due application, should have concerned this money only. Cf. American Law Institute, Restatement of the Law of Trusts, § 321; Vaizey, Settlements (1887), 1410, citing Lewin on Trusts, 4th ed., 309.

[21] *E.g.*, Williams, Vendors and Purchasers, 3rd ed., i., 248: 'the duties of trustees for sale, whether acting under a trust for or power of sale, are . . .'; *Re Tweedie and Miles* (1884) 27 Ch. D. 315, 318; also *ante*, note [11].

[22] Williams, *op. cit.*, 247—248.

[23] This turns, in the case of a trust for sale, upon the presence or absence of a power to postpone sale: *Re Kipping* [1914] 1 Ch. 62, 67; see now L. P. A., 1925, s. 25. But the power to postpone cannot usually be exercised unless such trustees are unanimous: *Re Hilton* [1909] 2 Ch. 548.

[24] Farwell, Powers, 3rd ed., 41: a trust for sale, 'so long as it is absolute and effective, changes the nature of the estate; and the beneficiaries are entitled only to a share of the proceeds, not to the estate itself.'

whether the authority to sell came to an end when all the beneficiaries were *sui juris* and absolutely entitled.[25] When the Settled Land Act, 1882, conferred statutory powers of sale upon equitable tenants for life, it became less usual to include in settlements mere powers of sale for the trustees,[26] and the Settled Land Act, 1925, now provides that the trustees cannot exercise such a power.[27] Accordingly, the overreaching authority with which this essay is primarily concerned is the *trust* for sale.

Title made by Trustees with the Concurrence of their Beneficiaries

When a prospective purchaser of land cannot claim to have no notice of the existence of trusts affecting it, and is not satisfied that a conveyance to him from the selling trustees will effectively overreach the trusts, a possible solution of the difficulty is that the beneficiaries should join in the conveyance—thereby releasing their equitable interests.[28] This method of making title is obviously inapplicable if any of the beneficiaries are under disability, or are as yet unborn or unascertained, or are unwilling to concur in the sale. Moreover, it may be an intricate and costly method; for the purchaser's natural anxiety lest he be saddled with constructive notice of some equitable right, which he in fact fails to detect, necessitates a full investigation of the equitable title—including any assignments, devolutions and mortgages of each beneficial interest.[29] And when he, in turn, desires to sell the land he must be in a position to allay the similar anxieties of his own purchaser. Further, there is the possibility that the beneficiaries under the trust may be reluctant thus to expose their private affairs to periodic investigation by a prospective purchaser and his successors. Despite the disadvantages on each side, the Court has in the past compelled protesting purchasers from trustees, who had failed to establish their supposed overreaching power, to accept such a

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[25] A trust for sale, unlike a power of sale, commonly endured until such beneficiaries unanimously elected to reconvert and requested the trustee to convey to them: *Re Horsnaill* [1909] 2 Ch. 631, 635; *Re Douglas and Powell's Contract* [1902] 2 Ch. 296, 312—313; Williams, *op. cit.*, i., 244; cf. Godefroi, Trusts, 3rd ed., 438. But in each case it is a question of construction: Sugden, Powers, 8th ed., 859—862. See now L. P. A., 1925, s. 23.

[26] Godefroi, *op. cit.*, 424. But section 63 of the Act of 1882 added importance to the distinction between a mere power of sale and a 'trust or direction for sale': where the latter existed, a life tenant had no statutory power of sale without the Court's consent: S. L. A., 1884, s. 7. See *post*, notes [72], [73].

[27] Section 108 (2). For the vital importance of trusts for sale to-day, see notes [32], [71], *post*.

[28] Williams, *op. cit.*, i., 225, 228, 241, 244, 577. Similarly, trustees for sale selling in circumstances which would otherwise be a breach of trust can thus make title: 'He [the purchaser] required the beneficiaries . . . to join in the conveyance. He had no right to require this unless the trustees had sold under terms which they had no right to impose': *per* Fry L.J., *Dunn* v. *Flood* (1885) 28 Ch. D. 586, 594. Cp. note[8], *ante*.

[29] See *Re Baker and Selmon's Contract* [1907] 1 Ch. 238, 241. Hence the purchaser frequently objected that this is a different title from that which the trustees contracted to give: *e.g.*, *ibid.* at p. 241; *Re Heads' Trustees and Macdonald* (1890) 45 Ch. D. 310, 314, 316—317. Nevertheless, it was ultimately settled that he must take it: *Re Atkinson and Horsell's Contract* [1912] 2 Ch. 1, 11; and see note [30], below.

title.[30] Unless a contract of sale clearly warrants that the vendor will make title in a particular way, he is free to do so in any way he can.[31]

Since 1925, however, it appears that selling trustees will rarely be able to employ this alternative mode of making title, unless they first establish that they have an effective ' trust for sale ' within the meaning of the Property Statutes.[32] Nevertheless, it may still prove useful where, although an effective trust for sale exists, the prospective purchaser raises some objection that the circumstances of the sale are likely to constitute a breach of trust and that his notice of this possible breach of duty may prejudicially affect his title.[33].

Title by Purchase without Notice of the Existence of the Trusts

Trusts are usually declared in writing, and purchasers are fixed with constructive notice of the contents of every document which they ought reasonably to have investigated.[34] Accordingly, a purchaser of land ordinarily has notice of any trusts affecting it, unless care was taken, when the trusts first attached to the land, to ensure that the chain of legal title contains no hint of the existence of either the trusts themselves or the document which created them. Thus to ' keep notice of the trusts off the title ' is not necessarily fraudulent or dishonest. The Courts have described it as a ' highly desirable and perfectly honest object.[35] True, it may increase the opportunities of a fraudulent trustee to sell the property at an under-value or to make away with the proceeds of sale. Yet the fact that it enables a purchaser to buy without knowledge or notice of the trusts tends at once to ensure that a satisfactory price is obtainable, and to exclude the doubts, complications and expense which may encompass a sale when the title shows or suggests to the purchaser that equitable interests are concerned.[36]

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[30] See note [29], above; also *Brickles* v. *Snell* [1916] 2 A. C. 599, 607—608. But the selling trustees must offer the concurrence of the beneficiaries in good time, *e.g.*, before the purchaser repudiates for want of title; and perhaps must show that they can *compel* such concurrence (*e.g.*, beneficiaries had requested or consented to the sale before the contract was made): *Re Hailes and Hutchinson's Contract* [1920] 1 Ch. 233.

[31] *Re Spenser and Hauser's Contract* [1928] Ch. 598, 606, 608: a statement that vendors will make title as trustees for sale is *prima facie* a mere statement of intention, not a warranty.

[32] Unless they hold on trust for sale as defined by L. P. A., 1925, s. 205 (1) (xxix), they will not ordinarily have or have power to convey the legal estate: S. L. A., 1925, ss. 4 (1), 13—cf. ss. 23, 24; nor can they require their purchaser to accept a title from the life tenant: *Re Bryant and Barningham's Contract* (1890) 44 Ch. D. 218.

[33] See *Dunn* v. *Flood* (1885) 28 Ch. D. 586, quoted *ante*, note [28]; Emmet, Notes on Perusing Titles, 12th ed., i., 154; Dart, Vendors and Purchasers, 8th ed., i., 460 (suggesting a device for concealing the matter). Section 42 (1) of L. P. A., 1925, does not prevent trustees from making title in this way, for it attacks only stipulations contained in the contract.

[34] *Patman* v. *Harland* (1881) 17 Ch. D. 353, 356; see also note [4], *ante*.

[35] *Re Chafer and Randall's Contract* [1916] 2 Ch. 8, 19; *Re Soden and Alexander's Contract* [1918] 2 Ch. 258, 264. Moreover, ' the draftsman's aim should be to frame a deed which shall be capable of serving as a good root of title ': Williams, Vendors and Purchasers, 3rd ed., i., 592; Dart, Vendors and Purchasers, 8th ed., i., 460, 461.

[36] *Re Soden and Alexander's Contract, supra*, at p. 264.

In order that this form of deception may achieve its desirable purpose, still further deception may be necessary. Thus, if one of the original trustees, to whom land has been conveyed ostensibly as beneficial owners, retires from the trusteeship or is replaced by a new trustee, it will be necessary to ensure that the conveyance which vests the land in the new and continuing trustees makes no mention of their trusteeship. This conveyance will therefore recite, perhaps, as its ostensible justification, that the land formerly belonged to A, B and C both at law [true] and in Equity [untrue]; that B, C and D are now beneficially entitled to the land in Equity [untrue]; and that they have accordingly requested A, B and C to convey the legal estate to them.[37] Let us suppose that this conveyance duly occurs, and that the present trustees (B, C and D) subsequently contract to sell the trust estate to a purchaser. The purchaser's solicitor, in the course of investigating the vendor's title to the land, will of course see this document. He will realise at once that the statements contained in its recitals, though conceivably true, almost certainly mask a trust.[38] Nevertheless, they provide a possible explanation, which, unless it is a falsehood, implies that there is no hidden trust.[39] Moreover, there is in conveyancing law a presumption that all things (*e.g.*—documents, abstracts of title, etc.) have been rightly done.[40] The Courts, therefore, do not regard such recitals as giving the purchaser constructive notice of some concealed trust. Accordingly, unless he has some substantial reason for doubting their veracity, he has no right to object to such recitals; for, even if they in fact conceal a trust, he will take the land without notice of and free from it.[41]

The device described above, which depends for its efficacy upon the fact that the purchaser is neither informed that the vendors are trustees[42] nor has notice of the trusts or any document in which the trusts are stated,[43] was evolved primarily for use when land is conveyed to trustees

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[37] Such recitals were employed, *e.g.*, in the cases cited in note [35], above, and in *Re Balen and Shepherd's Contract* [1924] 2 Ch. 365.

[38] *Re Soden and Alexander's Contract, supra,* at p. 263.

[39] *Aliter* if something on the title definitely suggests that the recital is a falsehood, *e.g.*, a recital before 1926 by personal representatives, inconsistent with their testator's will, that X had become entitled in equity: *Re Balen and Shepherds' Contract, supra ;* but cf. *Re Harman and Uxbridge, etc. Ry. Co.* (1883) 24 Ch. D. 720. Moreover, it is dangerous to imply that X became entitled in equity by virtue of some document—which the purchaser could then claim to see: *Re Chafer and Randall's Contract, supra,* at pp. 15, 19, 20—21, 23. The system ordinarily depends upon an assumption that the legal owner, who is reciting that X is now entitled in equity, himself had the equitable ownership and has conferred it upon X (either by parol or by the recital itself): *ibid.* at pp. 15—16; *Re Balen and Shepherd's Contract, supra,* at pp. 375, 377.

[40] Williams, Vendors and Purchasers, 3rd ed., i., 226, quoted with approval in *Re Chafer and Randall's Contract, supra,* at pp. 12, 19; *Re Soden and Alexander's Contract, supra,* at pp. 263, 265. See also note [81], *post.*

[41] See authorities cited in notes [35]—[40], above.

[42] See note [39], *ante.* The former practice of describing them as trustees was obviously unsafe: *Re Chafer and Randall's Contract* [1916] 2 Ch. 8, 20.

[43] For cases where a vendor's solicitor mistakenly disclosed the existence of trust instrument and trust respectively, see *Re Blaiberg and Abrahams* [1899] 2 Ch. 340; *Re Soden and Alexander's Contract* [1918] 2 Ch. 258.

on mortgage, as an investment of their trust funds.[44] Neither the conveyance to them, nor any subsequent conveyances necessitated by changes of trustees, reveals their trusteeship. The legal chain of title is thus kept clear of the trusts, to the advantage of the mortgagor (if he redeems the mortgage) and of any subsequent purchasers of the land. It is now settled that this device is of general application: its efficacy is not confined to cases where trustees acquire land as mortgagees.[45] It has been commonly employed, for instance, when trustees invest trust money in the purchase of land.[46] Moreover, it is settled that the existing doctrine of constructive notice will not be extended; and, further, that the modern tendency is to extend the range of recitals that a purchaser must accept as correct.[47] Evidently, therefore, this device may equally be employed even in the *creation* of a trust;[48] and this although the effects of modern statute law appear to restrict the circumstances in which its employment would be morally justifiable.[49]

As we shall shortly see, it is the practice, when creating a trust for sale, to use two separate documents. The one conveys the land to the trustees for sale. The other declares the beneficial interests. But, although that document which conveys the land to the trustees does not give any details of the beneficial interests, it does in fact state that they are trustees; it mentions the other document in which the trusts are contained; and it reveals that the beneficial interests are to be found there. Clearly, therefore, trusts for sale framed in this fashion are completely outside the limits of the system, described above, by which the very existence of the trust is concealed from subsequent purchasers.

Title under a Trust for Sale comprised in two Documents

Although not compulsory, the usual practice in modern times when creating a trust for sale is to employ two separate documents, in the

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[44] Williams, *op. cit.*, i., 225. See now L. P. A., 1925, ss. 112, 113, giving a purchaser independent protection against possible breaches of trust by a trustee-mortgagee.

[45] *Re Chafer and Randall's Contract*, *supra*, at pp. 12,13; *Re Soden and Alexander's Contract*, *supra*, at p. 263.

[46] *E.g.*, *Re Soden and Alexander's Contract*, *supra* (where they mistakenly disclosed to purchaser that they were trustees); *Re Pope's Contract* [1911] 2 Ch. 442 (same); *Re Chafer and Randall's Contract*, *supra* (was apparently a purchase by trustees, successfully disguised); see also *Carritt* v. *Real and Personal Advance Co.* (1889) 42 Ch. D. 263, 271, 273. Similar fictitious recitals may be employed in order to keep off the title intricate questions relating to equitable interests: *e.g.*, *Pearce* v. *Bulteel* [1916] 2 Ch. 844 (trust fraudulently but successfully concealed from mortgagee without notice); *Re Balen and Shepherd's Contract* [1924] 2 Ch. 365 (unsuccessful attempt to conceal former breaches of trust, since condoned).

[47] *Ante*, note [4]; *Re Soden and Alexander's Contract*, *supra*, at p. 264.

[48] The fact that trustees, thus disguised as joint beneficial owners, now give the impression to a purchaser that they hold on trust for sale (L. P. A., 1925, s. 36), should tend to facilitate the operation of this device.

[49] Ordinarily, it would now seem to be unfair thus to conceal the existence of a trust unless one is certain that the trustees, whom one intends to disguise as beneficial owners, will have an effective trust for sale as defined by the Property Acts of 1925: see *ante*, note [32]; *post*, note [71]. When used in such a case the device absolves purchasers from any concern lest the sale may constitute a breach of trust.

manner just described.[50] Books of precedents have recommended this device for over a century.[51] The reasons that have been given in its favour have sometimes been far from clear: often, at best, the ambiguous advantage claimed is that it 'keeps the trusts off the title.'[52] Clearly, as has been shown above, this cannot mean that a purchaser from trustees will have no notice of the existence of the trusts. He knows full well that they exist; for the deed which conveyed the land to the trustees, and which will form an essential link in his title, tells him so. Nor, indeed, does it ordinarily concern him that he is thus aware of the trusts: his only concern is that his vendors have a valid overreaching trust for sale and that he will not be affected with notice of any breach of trust that they may commit in the course of the sale.[53] Those authorities that give a more specific reason seem to provide the real clue. The primary advantage of employing two separate documents is that, on completion, the purchaser will take (as one of his necessary title deeds) the document which conveyed the legal estate to the trustees and conferred upon them their overreaching power; but he will leave with the trustees the document which sets out the trusts.[54] If, however, both conveyance and trusts were contained in a single deed, the purchaser was formerly entitled to take this deed, thus depriving the trustees of the document which states the trusts upon which they must hold the proceeds of sale.[55] To relegate the trusts to a separate document is evidently the more convenient practice. And, incidentally, the beneficiaries under a trust were likely to prefer a system which did not place in the hands of the

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[50] 29 Halsbury, Laws of England (ed. Hailsham), 550; Emmet, Notes on Perusing Titles, 12th ed., ii., 549. If created by will, there are now invariably two documents—the will and the assent. The modern system of employing two documents to effectuate a change of trustees (T. A., 1925, s. 35) was also in vogue before 1926: Vaizey, Settlements (1887), i., 293.

[51] Martin, Conveyancing (ed. 1840), iv., 341, and see p. 342 n. (recommending the trust for sale); Dart, Vendors and Purchasers, 3rd ed. (1856), 214; J. M. Lightwood, 3 Cambridge Law Journal, 62—63. But some of the books of precedents did not at first follow their own advice on this point: *e.g.*, Davidson, Common Forms in Conveyancing (1846), 128, 130 n.; Davidson, Precedents in Conveyancing, 2nd ed. (1855), i., 293 n.; *ibid.* 3rd. ed (1860), i., 287, 290 n.

[52] *E.g.*, Key & Elphinstone, Conveyancing Precedents, 14th ed., ii., 566 n. Cf. Hood & Challis, Property Acts, 8th ed., 96 ('is in most cases an obvious advantage'). Davidson's works, cited *ante*, note [50], give no reason.

[53] Accordingly, it has never been necessary to abstract the equitable interests under a trust for sale (whether or not contained in a separate instrument), unless title is being made with the concurrence of the beneficiaries. It is enough that the abstract shows a sufficient power to sell, with adequate authority (now statutory) to give receipts: Preston, Abstracts of Title, 1st ed. (1818), i., 134—135; *Re Soden and Alexander's Contract* [1918] 2 Ch. 258, 263. See now L. P. A., 1925, s. 10 (1).

[54] Martin, Conveyancing (1840), iv., 342 n.; Davidson, Precedents, etc., 3rd ed., iii. (1873), 57—59; Vaizey, *op. cit.*, i., 291; Williams, Vendors and Purchasers, 3rd ed. (1922), i., 641; Encycl. of Forms and Precedents, 2nd ed. (1925), xvi., 78, 231 n.; 29 Halsbury, Laws of England (ed. Hailsham), 550; Gibson, Conveyancing, 15th ed. (1938), 441.

[55] In such a case the purchaser ordinarily covenanted to produce the document when required: Davidson, *op. cit.*, 58—59; and *semble*, even apart from covenant, he was compellable in Equity: Sugden, Vendors and Purchasers, 14th ed., 445 n., at p. 447. Since 1925, the trustees can now retain the document: L. P. A., 1925, s. 45 (9).

purchaser and his successors such details of their private and family affairs as would be revealed by a perusal of the trusts.[56]

When first introduced, the practice was (as at the present time) to include in the conveyance to the trustees for sale all that a subsequent purchaser might wish to see—their various powers to dispose of the land, any provisions as to the appointment of new trustees, and (until implied by statute)[57] their power to give effective receipts to a purchaser.[58] It further directed the trustees to hold the proceeds of any sale, and the interim rents and profits of the land until sale, upon trusts to be declared in the trust instrument.[59] On the face of things, therefore, there was no reason why a purchaser should wish to see the trust instrument, or to have an abstract of it or of the title to the equitable interests which it had created. So long as the trustees had the legal estate and could show an effective trust to sell and power to give him a good receipt for the purchase-price, the trust instrument, which appeared (from the phrasing of the conveyance to the trustees) to contain nothing but trusts which his purchase would overreach, was no concern of his.

Nevertheless, certain writers have contended that, although the purchaser has no right to be given a copy of the trust instrument nor a covenant for its production (from which it appears to follow that his successors will ordinarily have no right even to see it[60]), he has a right to inspect it for the purpose of seeing that it contains nothing inconsistent with the trustees' power to give receipts or otherwise affecting the title.[61] This supposed right to inspect the trust instrument was said to rest upon the fact that the purchaser, being aware of its existence, would have constructive notice of its contents.[62] As early as 1840 there were indications that this alleged right had been disputed, and that in practice a purchaser usually accepted as sufficient evidence a statement by the vendor's solicitor that the trust instrument contained nothing to affect

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[56] Vaizey, Settlements, i., 294; also Butler's note 249, § XII, to Co. Litt. 290b—recommending this device in the eighteenth century for settlements of mortgage moneys.

[57] Receipt clauses were implied by statute during the first nine months of 1845, and from August 13, 1859, onwards: Sugden, *op. cit.*, 657—658. See, further, note [16], *ante*.

[58] Davidson, Precedents, etc., 3rd ed., iii., 59; Vaizey, *op. cit.*, 291—292, 293.

[59] The usual direction that interim rents and profits be applied or be treated as income of the proceeds of sale [see now L. P. A., 1925, s. 28 (2)] was intended *semble* to ensure a trust for sale effecting an immediate notional conversion: Davidson, *op. cit.*, 57—58. Such a direction might be implied: Vaizey, *op. cit.*, 294; but an indication that interim rents are to be regarded as realty might reduce the trust for sale to a mere power: *Re Hotchkys* (1886) 32 Ch. D. 408. In testamentary trusts for sale comprising residuary personalty such a direction would also operate to exclude the apportionment rule in *Howe* v. *Dartmouth* : see 4 Cambridge Law Journal, 357 *et seq.*

[60] Dart, Vendors and Purchasers, 3rd ed., 214. This follows from the rule that subsequent purchasers are entitled to assume that any previous trust for sale was duly exercised. But this rule is displaced where the facts (*e.g.*, undervalue) suggest that the sale was a breach of trust: Williams, Vendors and Purchasers, 3rd ed., 274—275.

[61] Dart, *op. cit.*, 214; Davidson, Precedents, etc., 3rd ed., iii., 59 n. Note that their contention is not that the instrument ought necessarily to be abstracted, but that its omission from the abstract does not enable a purchaser to assume that it contains nothing material to him. Cf. notes [53], *ante*, [84—87], *post*.

[62] Martin, Conveyancing (1840), iv., 333 n. (concerning the use of this device in settlements of mortgage money, and suggesting that the difficulty be met by concealing the existence of the trust).

the title.[63] In 1856, however, it was admitted that a right to inspect was 'generally considered' to exist.[64] In 1862 it was denied.[65] In 1873 and 1887 it was again supported.[66] In 1905 it was said that the production of the document 'cannot usually be required.'[67] In 1922 the principle of the right to inspect seems to be supported again.[68] In 1941 a dictum of Simonds J. asserts that no such right exists.[69]

Apparently, there is nothing in the Property Acts of 1925 to clarify the position,[70] nor have I found any judicial reasoning upon the point. Yet the question seems to be important, and for two reasons: (1) it is conceivable that the trust instrument may contain something which negatives or modifies the trust for sale; (2) a purchaser from trustees for sale takes subject to the trusts if he has notice that the sale was in breach of trust, and it is conceivable that there may be something in the trust instrument (*e.g.* a direction that any sale requires the consent of X) which would reveal such a breach of duty.

1. If something contained in the trust instrument can negative or defer a trust for sale expressed in a conveyance to trustees, the position of a modern purchaser is serious indeed. In virtue of the Property Acts, 1925, it would mean that a conveyance which, on its face, appears to have conveyed a legal estate to trustees upon trust for sale may in fact have given them nothing—neither the legal estate nor any power to dispose of the land.[71] There is no doubt that, in the past, the Courts have decided

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[63] Martin, Conveyancing (1840), iv., 333n. (in relation to settlements of money out on mortgage).

[64] Dart, *op. cit.*, 214.

[65] Sugden, Vendors and Purchasers, 14th ed., 418; but he gave no reason or authority for introducing this exception to his general rule that 'negative evidence, if in the vendor's possession, must be produced': *ibid.* As to this general rule, see also Dart, Vendors and Purchasers, 8th ed. (1929), i., 325—326.

[66] Davidson, *op. cit.*, 59 n. (arguing on the ground of a purchaser's right to have all relevant enquiries answered); Vaizey, Settlements (1887), i., 291—292.

[67] Gover, Hints as to Advising on Title, 4th ed., 108, citing Sugden (see note [64], *supra*).

[68] Jackson & Gosset, Investigation of Title, 4th ed., 161. Also Williams, Vendors and Purchasers, 3rd ed., i., 232; stating that it is imprudent not to inspect a document which may or may not affect the title, for (irrespective of the doctrine of notice) it may disclose some adverse *legal* interest. For the general duty of a purchaser from trustees to enquire whether the transfer is authorized by the trust, see *Bank of Montreal* v. *Sweeny* (1887) 12 App. Cas. 617.

[69] *Re Robb's Contract* [1941] Ch. 463, 471: 'the purchaser, who cannot look at the trust instrument, has no means of knowing whether an *ad valorem* duty has been paid,' unless (as was there held necessary) the conveyance to the trustees for sale bears an adjudication stamp.

[70] Section 10 (1) of the L. P. A., 1925, enacts that trust instruments are not to be *abstracted* if their contents will be overreached; but this is not the point. Nor is the point met by section 27 (1), which enacts that a purchaser from trustees for sale is not concerned with the trusts of the proceeds of sale: this is merely declaratory of the earlier law (Wolstenholme & Cherry, Conveyancing Statutes, 12th ed., i., 268). No doubt the reason for the conflict of opinions indicated in the text was uncertainty as to the true scope of the doctrine of constructive notice.

[71] Unless there is an 'immediate binding' trust for sale—see L. P. A., 1925, s. 205 (1) (xxix)—the land is likely to be settled land within the meaning of S. L. A., 1925. Thereupon section 4 (1) of the latter Act provides that the conveyance to the trustees (not being a vesting deed as therein defined) carries to them no legal estate. Apparently this difficulty does not arise, however, with trusts created by *will*: see S. L. A., 1925, ss. 6, 13 (which expressly excepts dispositions, *e.g.*, assents, made by personal representatives).

questions as to the existence of an imperative and immediate trust for sale[72] by considering the settlement as a whole, including the character of the beneficial interests comprised in it.[73] Admittedly, most of these decisions concerned trusts created by will, and so cannot be regarded, perhaps, as direct authorities upon the construction of a trust comprised in two separate documents. *In re Goodall's Settlement*,[74] however, is a notable exception, directly in point: construed in the light of the trust instrument, a conveyance to trustees upon trust to sell was there held to create no effective trust for sale. It is true that the reports of that case do not show whether the conveyance to the trustees stated, as is customary, that the intended trust instrument of even date was not to be executed until after the execution of that conveyance. Indeed, this point was probably immaterial as the law then stood: for the general rule appears to be, not only that contemporaneous documents should be read together, but, further, that documents bearing even date are regarded as contemporaneous for this purpose in whatever order they may have been executed.[75] Since the Property Acts of 1925, however, it seems to be of major importance to a purchaser from trustees for sale that the original conveyance to them on trust for sale was, or was clearly intended to be,[76] executed *before* their trust instrument. It is submitted that only in such a case is he protected from the risk that something in that trust instrument may have negatived or deferred the trust for sale; and, accordingly,

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[72] Most of these decisions concerned the question whether there was a 'trust or direction for sale' within the meaning of the Settled Land Act, 1882, s. 63; see note [26], *ante*. Seemingly, the tests employed by the Courts on this point were practically identical with the 'immediate binding' test imposed by the Acts of 1925.

[73] The nature of the trusts was a governing factor, *e.g.*, in *Re Hotchkys* (1886) 32 Ch. D. 408, C. A. ('upon trust at their discretion to sell': *held*, a mere power), distinguished in *Re Johnson* [1915] 1 Ch. 435 (where the trusts were those ordinarily applicable to personalty); *Re Newbould* (1914) 110 L. T. 6, C. A. ('upon trust to sell when they think proper': *held*, a mere power), where each judgment emphasized that the document as a whole, including the nature of the beneficial interests, must be considered. See also Williams, Vendors and Purchasers, 3rd ed., i., 242; Emmet, Notes on Perusing Titles, 12th ed., i., 648. Modern decisions as to the effect where some interest has priority to both trust for sale and trust instrument—*e.g.*, *Re Leigh's S. E.* [1926] Ch. 852; *Re Parker's S. E.* [1928] Ch. 247—raise a different question.

[74] [1909] 1 Ch. 440; 78 L. J. Ch. 241; 100 L. T. 223; conveyance *inter vivos* to trustees upon trust, at the request of X during his life and after his death at their discretion, to sell, and to stand possessed of the proceeds of sale and the interim rents and profits upon the trusts declared by an instrument of even date. *Held*: a mere power of sale, *because* (*inter alia*) *the trust instrument contained* a provision that X could direct that any of the land should not be sold. The fact that the conveyance to the trustees was apparently drafted in a form similar to that now in use adds significance to this decision. See also Wolstenholme & Cherry, Conveyancing Statutes, 12th ed., i., 591, indicating that its facts, in modern times, would constitute a settlement—not a trust for sale within the Property Acts, 1925.

[75] Jessel M.R., *Smith* v. *Chadwick* (1882) 20 Ch. D. 27, 62—63; Beal, Legal Interpretation, 2nd ed., 117, 150; Norton, Deeds, 2nd ed., 86—88.

[76] Rules of construction do not bow to questions of convenience: *Bottomley's Case* (1880) 16 Ch. D. 681, 686, *per* Jessel M.R. But the Court presumes that contemporaneous documents, which themselves show an intention that one shall take effect in priority to the other, were executed in such order as will 'give effect to the manifest intention of the parties'—whether or not they were in fact executed in that order: *Gartside* v. *Silkstone, etc. Iron Co.* (1882) 21 Ch. D. 762, 767—768, *per* Fry J. See also Preston, Conveyancing, 3rd ed. (1825), ii., 241—242, to the same effect as regards lease and release executed in the wrong order.

that only in such a case can he safely assume, without first inspecting the trust instrument, that nothing contained in it prevents the trustees from conveying to him the legal estate he has agreed to buy. The reasons submitted in support of this proposition are as follows:—(i) If, when the original conveyance was made to the trustees expressly upon trust for sale, there was as yet no trust instrument in force, a simple resulting trust arose in favour of the settlor.[77] (ii) At the outset, therefore, there existed no trust instrument or trust which might modify or defer the expressed trust for sale. (iii) It would follow that, at worst, an effective trust for sale was in existence until the trust instrument was executed. (iv) By virtue of section 23 of the Law of Property Act, 1925, when once an effective trust for sale has arisen it must be deemed to continue, ' as regards the safety and protection of any purchaser thereunder,' until the land is conveyed to or under the direction of the beneficiaries.

2. Has the purchaser constructive notice of anything in the trust instrument which may indicate that the sale to him is a breach of trust ? On the general doctrine that notice of a document affecting the title is notice of its contents,[78] it would appear at first sight that he has. Yet there are limits to this doctrine which may conceivably protect him. First, the doctrine extends only to documents which form part of the ' chain of title ':[79] it has been held inapplicable to documents which, from their nature, *may or may not* affect the land.[80] Probably a trust instrument of the type we have in mind, which is ordinarily expected to do no more than set out the trusts of the proceeds of sale and of the rents and profits pending sale, is such a document. As regards the contents of such a document, be it noted, the Courts have held that the purchaser need make no specific inquiries: the very fact that the vendors fail to bring it to his notice (*e.g.* fail to include it in the abstract of title) is regarded as an assurance that it is immaterial to him. In such matters he is entitled to assume that all things have been rightly done.[81] Secondly, it should be observed that the deed, which confers the legal title upon trustees for sale, customarily recites that the trust deed, though already prepared, has not yet been executed. This recital may be significant; for it has been said that, contrary to the general rule, notice

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[77] *Re Robb's Contract* [1941] Ch. 463, *per* Simonds J., at p. 470; *ibid. per* Greene M.R., at p. 473.

[78] See *Re Chafer and Randall's Contract* [1916] 2 Ch. 8, C. A., at pp. 18—19, 19—20.

[79] *Patman* v. *Harland* (1881) 17 Ch D. 353, 356; *Parker* v. *Judkin* [1931] 1 Ch. 475, 486. See also Daynes, K.C., arg., *Re Robb's Contract*, *supra*, at p. 465 (' the conveyance on trust for sale is the link in the chain of title ').

[80] *Jones* v. *Smith* (1843) 1 Ph. 244, 253—254 (mortgagee knew that mortgagor had made a settlement, but was told it did not affect the land to be mortgaged). This decision was subsequently extended (avowedly as regards choses in action only) to documents which, though known to affect the property, may or may not restrict in Equity the powers of the disposing party: *English, etc. Investment Co.* v. *Brunton* [1892] 2 Q. B. 700; *Re Valletort Laundry Co.* [1903] 2 Ch. 654.

[81] *Patman* v. *Harland* (1881) 17 Ch. D. 353, 357; *Re Cousins* (1886) 31 Ch. D. 671, 675: ' *omnia praesumuntur rite esse acta* ' (solicitor acting for both parties assumed to have obtained from himself a proper abstract of title and to be an honest gentleman). See also note [40], *ante*.

of the existence of a *draft* deed ('a deed in contemplation') is not constructive notice of its contents, and that Equity does not ordinarily expect a purchaser even to inquire whether in fact it was ever executed.[82] Thirdly, the doctrine of constructive notice is limited to inquiries and inspections which 'ought reasonably' to have been made;[83] and the test of reasonableness for this purpose is what is usually done by a prudent purchaser.[84] If it is an established fact that conveyancers customarily regard it as unnecessary to inspect the trust instrument, failure to make such an inspection does not result in constructive notice.[85] Finally, the rule that the settled practice of conveyancers is regarded as a source of law leads one to the same conclusion. In this connection, however, it has been said that a mere modern practice, in which some conveyancers differ from others, is not sufficient.[86]

It would thus appear that the doctrines of Equity are unlikely to fix upon a purchaser, who buys from trustees for sale without inspecting their trust instrument, constructive notice of any breach of trust which such an inspection would have revealed to him.[87] It would also appear that such a purchaser, in order to ensure that nothing in the trust instrument can prevent the trustees from conveying to him the *legal* title, should satisfy himself that the execution of the trust instrument was, or was intended to be delayed until after the land had been conveyed to the original trustees for sale.[88]

By way of conclusion, it is perhaps desirable to stress the point that the method and legal theory of 'keeping notice of the trusts off the title,' by concealing the fact that there is a trust, differ fundamentally from the practice of employing two documents when creating a trust for sale.

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[82] *Cothay* v. *Sydenham* (1788) 2 Bro. C. C. 391, 393; *Jones* v. *Smith* (1841) 1 Ha. 43, 63—64; *ibid.* (1843) 1 Ph. 244, 256—257 (where Lord Lyndhurst insisted that the doctrine of constructive notice should rest on gross negligence, not on what an exceptionally prudent purchaser would do). See also Sugden, Vendors and Purchasers, 14th ed., 779. *Quaere* whether these *dicta* can apply where (as with trusts for sale) the legal title includes a statement of present intention, under seal, to execute the draft deed immediately.

[83] See now L. P. A., 1925, s. 199 (1) (ii); also note [4], *ante*.

[84] Williams, Vendors and Purchasers, 3rd ed., i., 239. Compare Lord Lyndhurst's *dictum* mentioned above, note [82].

[85] See also Williams, *op. cit.*, i., 227: 'where the legal title is correct on the face of the abstract, the purchaser is not entitled to object to it on the mere suspicion of some Equity adverse to the title'—quoted with approval in *Re Chafer and Randall's Contract* [1916] 2 Ch. 8, at pp. 12. 19.

[86] *Re Ford and Hill* (1879) 10 Ch. D. 365, 370; *Re Chafer and Randall's Contract*, *supra*, at pp. 11—12, 24. Note also, *ibid.* at p. 11, the avowed reluctance of Younger J. to 'express any opinion which might have the effect of disturbing titles.' See, further, Holdsworth, History of English Law, vii., 385—386; xii., 301.

[87] *Aliter*, of course, if the trustees' solicitor specifies in the abstract any provisions of the trust instrument which indicate that the proposed sale is a breach of trust. Before 1926, it would seem that, theoretically, he was expected to do this. Whether he should do so to-day, depends upon the true meaning (undefined) of 'overreached' in section 10 (1) of the L. P. A., 1925.

[88] Otherwise it would seem that the trust instrument is 'on the title,' and should be investigated, both (i) at common law (because it may conceivably have conferred some legal interest), and (ii) as a result of the Property Acts of 1925 (because its contents may have negatived *ab initio* the creation of an 'immediate binding' trust for sale—see *ante*, note [71]).

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The primary object of the latter device was merely to relegate to a separate document the details of admitted trusts which, whether a purchaser knew of them or not, could not affect him unless the sale to him involved some breach of trust, of which he would be deemed to have notice. The trust instrument was therefore of no interest to purchasers apart from the somewhat remote possibility that the settlor had said, in this instrument which he had himself described (in his conveyance to the trustees upon trust to sell) as concerned merely with the destination of the proceeds of sale, something which restricted the power to sell.[89] When the Courts of Equity ultimately fixed the limits of the doctrine of constructive notice, by a series of decisions unrelated to trusts for sale, it so happened that their conclusions made this practice more desirable than before; for their conclusions implied that the one reason why a purchaser might wish to inspect the trust instrument had gone. It followed that the practice of employing a separate trust instrument, when creating a trust for sale, 'keeps off the title' anything in the trust instrument that may point to a breach of trust. No other aspect of the trusts has ever been on the title, when vendors are trustees for sale.

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[89] A more likely hint, to be found in a trust instrument, that a projected sale may possibly be a breach of trust, is that all the beneficiaries are absolutely entitled; for then, if *sui juris* and unanimous, they can cancel the trustees' authority to sell—*ante*, note [25]. But purchasers, since 1911, are now protected against this possibility—*ante*, note [18].

THE LEGAL EFFECT OF ILLEGAL CONTRACTS

GLANVILLE L. WILLIAMS

THE term 'illegal contract' is sanctioned by usage and is adopted in the title of this article for the sake of brevity; but it is not a very satisfactory expression. If a contract is a legal obligation, 'illegal contract' is a contradiction in terms. To say that a contract is illegal seems, on the face of it, to be no more than a clumsy way of saying that an agreement is void of legal consequences. There is, however, another possible interpretation of the term 'illegal contract,' namely, that it is an agreement the *entry* into which or the *performance* of which (on one or both sides) involves a breach of legal duty, or runs counter to morality or public policy. The illegality is not in the obligation, but in the making of the agreement or in the performance of it.[1] It is in this sense that the term is used in the present article, and, so understood, there is no paradox in asking whether an illegal contract can have a legal effect.

Usually, of course, an illegal contract is void,[2] because it would be against the law, morality or public policy to allow the enforcement of it. It makes no difference whether the illegality of performance arises from common law or statute (though in the case of statutory provisions it is a question of construction whether they were intended to vitiate contracts in contravention of them[3]), nor whether the party sued under the contract is the party who was to commit the illegality or the party who was to render the consideration. Nor does it make any difference that the party suing on the contract has performed his part;[4] nor that the contract admitted of being performed legally, if the plaintiff has performed it illegally;[5] nor even that the plaintiff thought that the contract was legal, if he knew the facts that made it illegal, for ignorance

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[1] Cp. Williston, *Contracts*, revised ed., § 1761: 'Not the illegality of the contract, but the illegality of the plaintiff's conduct either in entering into or in performing the contract is the true ground for denying recovery.' See also the classification in Salmond & Winfield, *Contracts*, 144-6.

[2] But a clause in the contract excluding liability for future negligence remains binding (*Vita Food Products* v. *Unus Shipping Co.* [1939] A. C. at p. 300-1), probably because it lets in the defence of *volenti non fit injuria* in tort, which is independent of contract.

[3] Pollock, *Contract*, 10th ed., 327-33; Anson, *Contract*, 18th ed., 211. See, in particular, the revenue cases reviewed by McCardie J. in *Brightman & Co., Ltd.* v. *Tate* [1919] 1 K. B. 463, at p. 469, and Williston, § 1768. See also the collection of cases in *Eng. and Emp. Digest*, xii, 269-74.

In the U.S. the failure to procure an occupational or business licence has been held not to affect the validity of contracts, even though the action is by the party in default, if denial of recovery would be wholly out of proportion to the requirements of public policy: Williston, revised ed., 1939 Supp. to vol. 5, p. 57 (additional note to § 1630, n. 7).

[4] See, *e.g.*, *Brightman & Co., Ltd.* v. *Tate* [1919] 1 K. B. 463; Williston, § 1650.

[5] *Bensley* v. *Bignold* (1882) 5 B. & Ald. 335; Williston, § 1761; but in the U.S. slight illegality in performance is sometimes disregarded: Williston, § 1767.

of the law is no excuse. As Blackburn J. put it in *Waugh* v. *Morris* (1873),[6] 'where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not.'[7]

There are, however, some exceptions to the general rule of voidness, where the party who is suing on the contract is morally innocent. It is proposed to consider first of all the authorities in favour of these exceptions, and then to consider the difficulty raised by the decision of the Court of Appeal in *Re Mahmoud and Ispahani* (1921).[8]

(1) Exceptional Cases in which a Morally Innocent Plaintiff can Recover

Waugh v. *Morris* established an exception to the general rule of voidness, in the case where the contract on its wording admits of being legally performed. Even though the parties intended when the contract was made to perform it in a way that, as the plaintiff now discovers, is illegal, still the plaintiff can enforce the contract if he is content that it shall be performed in a way that is both legal and within its terms. On the other hand, if when the contract was made the plaintiff knew that the intended mode of performance was illegal, he will not be able to enforce it simply by changing the performance that he claims to some legal performance within the wording of the contract.[9]

Arguing from the analogy of *Waugh* v. *Morris*, Pollock[10] considered that where a contract is unlawful when made, but the parties do not know this, the contract becomes enforceable if by a subsequent change in the law such a contract becomes lawful. Presumably the same result would follow if the defendant originally knew of the illegality, but the plaintiff did not. But it seems that if the plaintiff knew of the illegality at the outset a subsequent change in the law will not help him.[11]

Another exception or quasi-exception to the rule that all illegal contracts are void is where the terms of the contract are lawful, but one party, B, intends to use it in furtherance of an unlawful purpose. Here, if the illicit purpose is known to the other party, A, A generally

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[6] L. R. 8 Q. B. 202, at p. 208. Cp. *Nash* v. *Stevenson Transport, Ltd.* [1936] 1 All E. R. 906.

[7] But according to the *Restatement of the Law of Contracts* (hereinafter cited as *Restatement*), § 599, 'where the illegality of a bargain is due to . . . (*b*) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain.' In other words, this is a case where ignorance of the law is regarded as excusable. Cp. Williston, §§ 1631, 1767.

[8] [1921] 2 K. B. 716.

[9] Cp. Williston, § 1629A.

[10] *Contract*, 10th ed., 439.

[11] Williston, § 1758. For the case of change of purpose regarding performance not unlawful in itself, see Williston, § 1760.

cannot sue upon the contract.[12] But if the illicit purpose is not known to him when the contract is made, the contract is not regarded as illegal *quoad* him. He is entitled to refrain from performance upon discovering the clandestine purpose of the other,[13] and can then sue for damages under the contract as if on a breach.[14] For instance, if A has agreed to sell B a gun, not knowing that B intends to commit a murder with it, it is submitted that A can, on discovering B's purpose, withhold the gun and sue for damages for non-acceptance; or, if he has already delivered the gun before discovering B's purpose, he can sue for the price. Apparently the contract remains illegal *quoad* the guilty party, and if his secret purpose is brought to light he cannot enforce the contract.[15]

We now pass to the really difficult case, namely, where the terms of the contract are such that it cannot be performed without the commission of illegality by one or both parties, but one party is (or both parties are) ignorant of a fact that creates the illegality. In other words, one party is (or both parties are) labouring under a mistake not of law but of fact, such that had the facts been as supposed the contract would have been legal. If *both* parties make this mistake, and if neither party can be regarded as warranting the legality of the contract, it is clear that the contract is void.[16] But if only one party (A) makes the mistake, or if B can be regarded as warranting the legality of the contract, it would seem at first sight that A ought to be able to enforce the contract, in the sense that he ought to have an action for damages for breach of contract. As an illustration, suppose that B agrees to sell a watch to A, and, unknown to A, the watch belongs to C. Now the performance of this contract would undoubtedly involve an act contrary to law, namely, the conversion of C's watch by B. Nevertheless it seems obvious that as A does not know the facts giving rise to the illegality, he can recover damages for non-performance from B.[17] Take

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[12] *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 213; *Upfill* v. *Wright* [1911] 1 K. B. 506; *Alexander* v. *Rayson* [1936] 1 K. B. 169. But according to the *Restatement*, § 602 (1), 'where a bargain is illegal only because of the improper use which one party to the bargain intends to make of what he obtains thereunder, knowledge of this purpose by the other party does not preclude recovery of damages for what has been obtained unless the intended purpose involves serious moral turpitude, or unless a statute prohibits recovery.' Cp. Williston, §§ 1754-6, and cases in *Eng. and Emp. Digest*, xii, 275-7.

[13] Anson, *Contract*, 18th ed., 248; Williston, § 1757.

[14] Salmond & Winfield, *Contracts*, 157-9; *Restatement*, § 577, Comment b, § 599; Williston, §§ 1629A, 1670. Pollock, *Contract*, 10th ed., 412, 441, speaks of A as being entitled to 'rescind' the contract when he discovers B's purpose, and of the contract then being 'voidable' by him. It is submitted that these words do not mean that if A refuses to go on with the contract he has no remedy under it.

[15] It may be otherwise if his illegal purpose is only indirectly connected with the contract. An insurance of furniture in a bawdy house has been held valid in Missouri, invalid in Quebec: see (1910) 23 Harvard Law Review, 635-6. See also C. K. Allen in (1938) 54 L. Q. R. 211, n. 19.

[16] *Toulmin* v. *Anderson* (1808) 1 Taunt. 227; *Wilkinson* v. *Loudonsack* (1814) 3 M. & S. 117; Salmond & Winfield, *Contracts*, 159.

[17] It is submitted that he can equally recover damages from B even though he knew at the date of the contract that the watch did not belong to B, provided that he believed that B intended to acquire the ownership in it before the time when the property was to

another illustration. 'A enters into a bargain with B by which B agrees to cut down trees on Blackacre. B reasonably[18] believes when he enters into the bargain that Blackacre belongs to A, but before entering upon the work discovers that Blackacre belongs to C, who prohibits entry upon the land.' So runs an illustration in the *Restatement*,[19] and the ruling given is: 'B can recover damages from A for his loss of profit on establishing his readiness and willingness to perform if performance had been legal. It is immaterial that A believes that he owns Blackacre. His employment of B involves a representation and assumption of risk as to the facts making performance legal.' Again, take the case of a printer who agrees to print a particular work which, unknown to him, contains a libel. Cannot he recover the contract price or (if he discovers the libel before completing the work) damages for his loss including loss of profit? The question can be answered in the affirmative by common-sense, but little help is to be got from the authorities.[20] It is true that the contract, if performed, will result in a tort, and a tort not only by the employer but also by the printer. Nevertheless there is no public policy against allowing a morally innocent printer to recover the contract price for the work, and it is submitted that he can.

All these examples concern contracts that are illegal because they involve torts (though it may be noted that libel is, in certain circumstances, a crime as well as a tort). That the principle need not be confined to contracts involving torts is indicated by the two cases of *Wild* v. *Harris* (1849)[21] and *Millward* v. *Littlewood* (1850),[22] where a woman recovered damages for breach of promise of marriage from a man who, unknown to her at the date of the engagement, was already married. The argument in the first case turned upon the question whether the defendant received a real consideration for his promise,[23] but in the second case the point of public policy was raised and decided for the plaintiff. The two cases were apparently approved by Phillimore J. in *Spiers* v. *Hunt* (1908),[24] 'upon the ground of estoppel or warranty

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pass, or that B was warranting that he would either acquire the ownership or pay damages for non-delivery. The Sale of Goods Act, 1893, s. 12 (1), contemplates that a person may agree to sell goods to which he is not at present entitled, for in the case of an agreement to sell the implied undertaking as to title is simply that the seller 'will have a right to sell the goods at the time when the property is to pass.'

18 Query the need for this word.

19 § 599, Illustration 2.

20 In two *Nisi Prius* cases the printer failed to recover, but the pamphlet was obviously immoral or libellous: *Forcs* v. *Johnes* (1802) 4 Esp. 97; *Poplett* v. *Stockdale* (1825) R. & M. 337, 2 C. & P. 198. In *Clay* v. *Yates* (1856) 1 H. & N. 73, a printer was allowed to recover for the printing of a treatise, where a libellous dedication was afterwards written for it. No claim was made in respect of the printing of the dedication, although this work had been completed by the printer before he discovered its libellous character. See also *Apthorp* v. *Neville* (1907) 23 T. L. R. 575.

21 7 C. B. 999. Cp. *Daniel* v. *Bowles* (1826) 2 C. & P. 553.

22 5 Ex. 775 (Pollock C.B. dissenting).

23 Some writers find difficulty with the decisions in the two cases on the point of consideration (*e.g.*, Hope in 32 H. L. R. 679); but cp. Williston, §§ 1933-4.

24 [1908] 1 K. B. 720, at p. 723.

of capacity.' They were also distinguished without being disapproved in *Wilson* v. *Carnley* (1908),[25] where the plaintiff knew at the date of the promise that the defendant was married. Vaughan Williams L.J. again said that they might possibly be supported on the ground of estoppel or warranty. We shall return to the warranty suggestion later; as to estoppel, there is clearly a difficulty in regarding that doctrine as sufficiently powerful to exclude evidence of illegality.[26] With respect, it is submitted that *Wild* v. *Harris* and *Millward* v. *Littlewood* are supportable on the ground on which they were decided, namely, that the defendant had broken his contract, which, in favour of an innocent plaintiff, was perfectly valid. The rule is approved in the *Restatement* (§ 599), which lays down that ' where the illegality of a bargain is due to . . . facts of which one party is justifiably ignorant and the other party is not, . . . the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain.' In other words, as the Comment goes on to explain, ' if, on discovering the illegality, [the innocent party] renders no further performance, he can recover the same damages that would be recoverable for any wrongful breach of contract.'[26] There is one English case (*Re Mahmoud and Ispahani*) that seems to be against this rule, but discussion of it is postponed to the next section.

Before concluding the present section, mention may be made of one particular group of cases in which the innocence of the plaintiff affects the legality of the contract. These cases concern contractual indemnity against legal liability. To take first of all indemnity against civil liability, the general principle appears to be that a contract by B to indemnify A against A's civil liability in respect of an unintentional wrong is good, but in respect of an intentional wrong is void as against public policy.[27] The exact line between intentional and unintentional wrongs is not easy to draw. If A is led to publish a libel, making a reasonable mistake of fact such that were the facts as he supposed it would be no libel, it is clear that an express or implied contract by B to indemnify him is good.[28] It is submitted that the same result should follow even though A's mistake is negligent. If, however, the libellous character of the publication is

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[25] [1908] 1 K. B. 729 (C. A.).

[26] Cp. Salmond & Winfield, *Contracts*, 157-9; Williston, § 1631.

[27] *Restatement*, § 572, expresses the rule in a slightly different form: ' A bargain to indemnify another against the consequences of committing a tortious act is illegal unless the performance of the tortious act is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act.'' See also Williston, §§ 1692A, 1631, 1751.

[28] *Daily Mirror Newspapers, Ltd.* v. *Exclusive News Agency* (1937) 81 Sol. Jo. 924: the defendants supplied the plaintiffs with a wrongly-captioned photograph; the defendants were held liable to indemnify the plaintiffs against the damages that they had to pay for libel. See also *Birmingham, etc. Land Co.* v. *L. & N. W. R.* (1886) 34 Ch. D. at pp. 272, 274-5; *Sheffield Corp.* v. *Barclay* [1905] A. C. at p. 397 (Lord Halsbury). Also *Fletcher* v. *Harcot* (1622) Hut. 55. For authorities on indemnities against breach of contract and breach of trust, see below, note [36].

known to A, he cannot recover under the contract[29] though the Court can award him contribution or indemnity against a joint tortfeasor.[30] Then, as to the tort of negligence, it has twice been held that a policy of automobile insurance against third-party claims is good even though the particular third-party claim is made in respect of driving that is so negligent as to be not only a tort but a criminal offence.[31] In *Haseldine* v. *Hosken* (1933),[32] Scrutton and Greer L.JJ. reserved their opinion as to the correctness of these decisions; but they accord with the view expressed in the *Restatement* (§ 572, Illustration 4), and it is submitted that any other rule would make nonsense of the modern legislation for mitigating the evil consequences that result from negligent driving.[33] *Haseldine* v. *Hosken* itself concerned the tort not of negligence but of champerty; the decision was that a solicitor's indemnity policy was void in so far as it purported to indemnify him against the results of entering into a champertous agreement, even though the solicitor when he entered into the agreement did not realize its illegal nature. All the facts constituting the unlawfulness were known to the solicitor, and his mistake of law did not help him. It is submitted that this decision can be supported without impugning the cases on automobile insurance. There is a clear distinction between an insurance against champerty and an insurance against the tort of negligence committed by the motorist. It may, of course, be said that all the facts constituting the unlawfulness are known to a motorist who drives negligently, just as much as they are to a solicitor who enters into a champertous agreement. But the difference is that the general consequences of the champertous agreement are intended by the solicitor, whereas the consequences of his negligence are not intended by the motorist.

Another decision that has to be applied carefully if it is not to give undesirable results is, that of the House of Lords in *Weld-Blundell* v. *Stephens* (1920).[34] In that case the facts, shortly stated, were that A wrote to his agent B a letter containing defamatory statements concerning X. B's partner, C, negligently failed to keep the letter secret; it came to X's knowledge, and X recovered damages against A for libel, the jury finding that A had written the letter with express malice. The question was whether A could recover from B the damages that he had

[29] *W. H. Smith & Son* v. *Clinton* (1908) 99 L. T. 840; cp. P. H. W. in (1933) 49 L. Q. R. 162. *Shackell* v. *Rosier* (1836) 2 Bing. N. C. 634, was a peculiar case where the contract of indemnity was made after the commencement of the libel action against A, the consideration being that A should defend the action. The indemnity was held void. But see Williston, § 1751, n. 12.

[30] Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), Part II.

[31] *Tinline* v. *White Cross Insurance Association* [1921] 3 K. B. 327; *James* v. *British General Insurance Co.* [1927] 2 K. B. 311; cp. Williston, § 1751. For another case in which contractual indemnity against liability for negligence was held valid, see *Newcombe* v. *Yewen* (1913) 29 T. L. R. 299.

[32] [1933] 1 K. B. 822.

[33] Road Traffic Act, 1930 (c. 43); Road and Rail Traffic Act, 1933 (c. 53), s. 33; Road Traffic Act, 1934 (c. 50); Third Parties (Rights against Insurers) Act, 1930 (c. 25).

[34] [1920] A. C. 956, affirming [1919] 1 K. B. 520 (C. A.); followed by Luxmoore J. in *Bradstreets British, Ltd.* v. *Mitchell* [1933] Ch. 190. Cp. Winfield in (1936) 14 Canadian Bar Review, 661.

had to pay X. It was held by the Court of Appeal (1) that there was an implied duty in the contract of agency that B should keep the letter secret, and that this duty was not contrary to public policy and had been broken by B (apparently he was vicariously liable for the negligence of his partner), but (2) (Scrutton L.J. dissenting) that A could not recover damages from B in respect of the damages that he had had to pay X, for this head of damage did not result from B's breach of duty. On appeal to the House of Lords on point (2), the decision of the Court of Appeal was upheld by three law lords to two. The actual decision is no more than an application of the law of remoteness of damage to the particular contract there under consideration, and it does not conflict with the rules stated in the preceding paragraph. A dictum of Lord Wrenbury, however, is capable of causing difficulty unless read in the light of the facts of the case. He expressed the opinion that A was ' in no sense damaged by being compelled to satisfy his legal obligation ' to X.[35] If this means that *in fact* a man is not damaged by being compelled to satisfy a legal obligation it is obviously untrue. If it be meant to assert a legal fiction that such damage does not exist, we are justified in asking what public policy (or other reason) there is for creating such a fiction. If the fiction exists it means that all the cases discussed in the previous paragraph in which an indemnity was recovered in respect of the satisfaction of a legal obligation were wrongly decided. It means, for instance, that if B sells goods to A that are not of merchantable quality, and A re-sells to C, and A is compelled to pay C damages under section 14 of the Sale of Goods Act, A cannot recover these damages from B, notwithstanding a body of cases to say that he can.[36] It also means that the system of compulsory third-party insurance under the Road Traffic Act is so much waste paper. High as Lord Wrenbury's authority is, it is easier to suppose that his dictum was too wide than that these consequences should follow from it.

Turning to indemnity against criminal liability, the authorities are in conflict. In *Cointat* v. *Myham* (1913),[37] a plaintiff who had been convicted under the Public Health Act of having unsound meat for sale was allowed to recover his penalty from his vendor. But in *Leslie* v. *Reliable Advertising and Addressing Agency* (1915),[38] contractual indemnity against a criminal penalty was not allowed, even though

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[35] [1920] A. C. at p. 997.

[36] See cases collected in Chalmers, *Sale of Goods*, 11th ed., 143, n. (i). One of these cases, *Agius* v. *G. W. R.* [1899] 1 Q. B. 413 (see, particularly, *per* Lord Halsbury L.C. at pp. 418-9), was referred to with approval in *Weld-Blundell* v. *Stephens* in the House of Lords. See also *Groves* v. *Webb* (1916) 85 L. J. K. B. 1533, 114 L. T. 1082.

Likewise there is authority for saying that a contract to indemnify against liability for an innocent breach of trust is valid: *per* Farwell J. in *Briggs* v. *Parsloe* [1937] 3 All E. R. at pp. 838-9; Pollock, *Contract*, 10th ed., 315, n. (*m*).

[37] [1913] 2 K. B. 220. See also *Crage* v. *Fry* (1903) 67 J. P. 240; *Campbell* v. *C.* (1840) 7 Cl. & F. 166, at p. 182 (action for account against partner).

[38] [1915] 1 K. B. 652, following *dicta* in *Colburn* v. *Patmore* (1834) 1 C. M. & R. 73. In *Weld-Blundell* v. *Stephens* [1919] 1 K. B. 520, Scrutton L.J. dissenting, reserved the liberty to consider whether these *dicta* were correct.

the plaintiff was morally innocent. The question is really one of public policy in each case, but it is submitted that the latter case was unfortunately decided. Had recovery been allowed, it would have shifted the penalty from the morally innocent person to the real offender; and this would have served rather than thwarted the object of criminal punishment.

(2) The Decision in Re Mahmoud and Ispahani

In *Re Mahmoud and Ispahani* (1921),[39] the facts were that by a statutory order made during the last War, no one should ' buy or sell or otherwise deal in ' certain articles except in accordance with a licence issued by the Food Controller. Linseed oil was included. The plaintiff possessed a licence to sell linseed oil, his licence providing that sales should be made only to persons holding a licence. The plaintiff entered into negotiations to sell oil to the defendant, and asked the defendant whether he had a licence. The defendant replied that he had, and thereupon the contract was concluded. In fact, the defendant had no licence, and refused to accept delivery on this ground. The plaintiff resold the oil at a lower price in the market and sued for the difference between the contract price and the price he had received, by way of damages for non-acceptance. It was held by the Court of Appeal that he could not recover, the contract being illegal. It is not necessary to recapitulate the authorities cited for the decision; suffice it to say that none of them was decisive (in fact, they tended towards the contrary view), and that none of the authorities and arguments considered in the present article seem to have been put before the Court. Scrutton L.J. rested his judgment on the ground that the plaintiff had committed an offence against the Order, though he was morally innocent.[40] If this is the *ratio decidendi*, the decision is clearly distinguishable from those in *Wild* v. *Harris* and *Millward* v. *Littlewood*, for in those cases the plaintiff had not broken the law. However, Bankes and Atkin L.JJ. adopted a wider principle, holding that the illegality of the contract was fatal to the plaintiff's success, and that it was not material to consider whether the plaintiff had himself committed an offence under the order in making the contract. (Bankes L.J. went on to say that the plaintiff had, in his opinion, committed an offence, but Atkin L.J. (as he then was) viewed ' with some trepidation any tendency to diminish the importance of the rule as to *mens rea* which has prevailed in respect of criminal charges.') Atkin L.J. assumed that a contrary decision would mean that the legislation would be reduced to an absurdity, for the seller could ' then hand over the goods to the lying purchaser free from any restrictions whatever and leave him in control of the goods.'[41]

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[39] [1921] 2 K. B. 716.

[40] See the development of this strict interpretation of statutory offences traced by R. M. Jackson, ' Absolute Prohibition in Statutory Offences,' (1936) 6 Cambridge Law Journal, 83.

[41] The judgments suggest that the decision might have been otherwise (1) if the statutory prohibition had been for the benefit of a particular person, and not for the

Without for the moment examining the validity of this reasoning, it may be pointed out that the plaintiff in *Re Mahmoud* was not altogether without remedy. He could have sued in deceit,[42] and on that (it is submitted) he would certainly have succeeded. The principle is that if B, by means of a fraudulent misrepresentation, induces A to enter into a contract that in reality is illegal (*i.e.*, because its performance would involve illegality), A can sue B for deceit if the representation was such that had it been true the contract would have been legal. Thus, in the unusual case of *Burrows* v. *Rhodes* (1899),[43] a person who had been induced to take part in the Jameson raid through a fraudulent misrepresentation as to its legality was held entitled in law to recover damages for (*inter alia*) the loss of a leg.[44]

It seems, then, that the successful plaintiffs in *Wild* v. *Harris* and *Millward* v. *Littlewood* could equally have succeeded in an action of

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benefit of the public (*per* Scrutton L.J. at p. 729), or (2) if the contract had been not prohibited by legislation but simply against public policy at common law (*per* Atkin L.J. at p. 731). It is not easy to gather the principle on which Atkin L.J. thought that this second distinction should be drawn. See as to (1), *Restatement*, § 601; Williston, §§ 1632 (where refusal to enforce would produce the very effect that the law seeks to guard against), 1770.

[42] Bankes and Scrutton L.JJ. expressly left open the possibility of the plaintiff having an action in deceit.

[43] [1899] 1 Q. B. 816.

[44] On the other hand, if the fraudulent misrepresentation does not go to the legality of the transaction—*i.e.*, if it is such that, even on the facts as stated, the transaction would be illegal,—the plaintiff cannot recover for the tort of deceit if to allow him to recover would be against public policy: *Parkinson* v. *College of Ambulance* [1925] 2 K. B. 1. It is submitted, however, that unless public policy is against it, a plaintiff ought not to be denied an action in tort merely because he is a wrongdoer. Cp. *Dott* v. *Brickwell* (1906) 23 T. L. R. 61; *Neal* v. *Ayers* (1940) 63 C. L. R. 524, noted (1941) 14 Aust. L. J. 68, 198, 424; Williston, § 1791. In *Parkinson's case* it was clearly against public policy to allow the plaintiff to recover. Yet in some cases the maxim *ex dolo malo non oritur actio* has been applied against the plaintiff in tort, without any consideration being given to the public policy of the case. See *Fivaz* v. *Nicholls* (1846) 2 C. B. 501. In *Hegarty* v. *Shine* (1878) 14 Cox, 145, a woman who entered into an immoral cohabitation was held by the Irish C. A. to have no action in assault against the man for his concealment of venereal disease, with which she became infected. It will be noticed that the action was not brought in deceit. In *Siveyer* v. *Allison* [1935] 2 K. B. 403, the defendant fraudulently represented that he could obtain a decree of nullity from his wife, and so put himself in a position to marry the plaintiff; on the strength of this the plaintiff entered into an immoral association with him. Greaves-Lord J. held that she could not recover damages in deceit in respect of this association, despite the fact that before she met the defendant she had been of moral character. The decision seems to be inconsistent with the practice of allowing a woman who has been seduced on the strength of a promise of marriage to recover aggravated damages in an action for breach of promise: *Berry* v. *Da Costa* (1866) L. R. 1 C. P. 331; *Millington* v. *Loring* (1880) 6 Q. B. D. 190 (seduction and infection with disease). It also seems to be inconsistent with the public policy of the case, for who can doubt that to allow recovery to such a plaintiff would tend to decrease rather than to increase immoral associations? In some American jurisdictions the blind application of the *ex turpi causa* maxim has debarred plaintiffs who violate statutes against Sunday travelling from suing for injuries received in the course of such travelling, and has similarly outlawed plaintiffs who operate a car without a licence; but the weight of opinion is against this. See Pollock, *Torts*, 14th ed., 138-9; Wigmore, *Cases on Torts* (1912), ii., 171 *ff.*; Harold S. Davis, 'The Plaintiff's Illegal Act as a Defence in Actions of Tort' (1905) 18 Harv. L. Rev. 505, reprinted in *Selected Essays on the Law of Torts* (1924), 558; (1926) 39 Harv. L. Rev. 1088; (1926) 35 Yale L. J. 763 (purchase on Sunday of injurious beverage); (1929) 38 Yale L. J. 685; (1930) 39 Yale L. J. 743; *Restatement, Torts*, § 469; Harper, *Torts*, § 136. In Australia and Canada the absence of a driving licence has been held to be irrelevant in tort: see (1930) 4 Aust. L. J. 89; (1928) 6 Can. B. R. 76; other Canadian cases are critically discussed by F. C. Cronkite in (1929) 7 Can. B. R. 67.

deceit. In *Beyers* v. *Green* (1936),[45] where Mr. B became engaged to marry Miss A by means of an express fraudulent misrepresentation that he was a bachelor, Miss A succeeded in an action in the King's Bench Division for breach of promise of marriage and fraud. It is true that in this case there was an express representation by Mr. A as to his celibacy, but it seems that on principle such a representation can be implied from the mere fact of entering into the contract. 'The cruellest lies are often told in silence,' and although English law has been reluctant to imply representations for the purpose of the law of deceit, there are cases where it has done so. In *Bodger* v. *Nicholls* (1873),[46] the sending of a cow to market was held to be an implied representation that it was not suffering from an infectious disease, one reason for the implication being that it would have been a statutory offence to send a diseased cow to market. (Perhaps it needs a legal mind to see the relevance of this analogy !) In *Melhuish* v. *Milton* (1876),[47] it was held that to go through a ceremony of marriage is an implied representation of capacity to marry; and there is no reason why the same should not be held for a promise to marry.

There is, however, an important difference between an action on the contract and an action in tort for deceit. This is in the measure of damages. Damages in contract are based on the loss to the plaintiff through the non-performance of the contract, whereas damages in deceit are based on the loss to the plaintiff sustained in consequence of the deceit. The two measures may coincide, but will not necessarily do so. For instance, suppose that B deceitfully induces A to agree to sell him goods, and that later B refuses to take delivery. If A sues B on the contract, he will get his loss of profit, namely, the difference between the contract price and the market price at the time when the goods ought to have been accepted.[48] This should put him into substantially the same position as if the contract had been performed. But if he sues in deceit, he will get only such damages as he has sustained from the deceit.[49] If, for instance, A did not buy fresh stocks in order to execute the order, and did not refrain from selling to any customer to whom he would otherwise have sold, his only damages in deceit will be damages for the trouble to which he was put in going on with the negotiations after the deceitful statement was made. He will not get damages for a drop in the market price of goods that he has in stock,

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[45] [1936] 1 All E. R. 613.

[46] 28 L. T. 441. See also Spencer Bower, *Actionable Misrepresentation*, 2nd ed., 68-9, and particularly at p. 69, n. (c) as to *Ward* v. *Hobbs* (1878) 4 App. Cas. 13.

[47] 3 Ch. D. 27, at p. 35.

[48] Sale of Goods Act, 1893, s. 50 (3).

[49] See Spencer Bower, *Actionable Misrepresentation*, 2nd ed., 221-8. In the U.S. the majority of cases apply the contract measure of recovery in deceit (Fuller & Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale L. J. at p. 409; Harper, *Torts*, § 226), but the *Restatement* (*Torts*, § 549) adopts the tort measure.

It seems that in a situation like that in *Re Mahmoud*, modern civil-law systems, applying the doctrine of *culpa in contrahendo*, give only the tort measure of damages: see Heinz Schwenk in (1940) 15 Tul. L. Rev. 87.

for this is damage that he would have suffered even if the deceitful statement had not been made. To use the convenient expressions of two American writers,[50] the law of deceit protects only the 'restitution interest' and the 'reliance interest,' whereas the law of contract goes farther and protects the 'expectation interest.' The report of *Re Mahmoud* does not tell us whether the plaintiff had altered his position on the faith of the contract; if he had not, that explains why he did not think it worth his while to sue in deceit. A similar distinction between an action on the contract and an action in deceit holds good in the case of an engagement to marry induced by fraud.

Let us now enquire in more detail into the pros and cons of *Re Mahmoud*. The discussion may be presented in the form of a debate between a practically-minded lawyer and a legal theorist.

The Practical Man's Objection to Re Mahmoud

'I do not like the decision in *Re Mahmoud*,' said the practical man. 'I can understand that the Court will not decree specific performance in such a case. If the Court were to do that it would make itself a party to lawbreaking. But all that the plaintiff asked for in *Re Mahmoud* was damages, and I do not understand why he did not get them.

'I can think of five reasons why the Courts in general refuse to award damages for breach of an illegal contract, but not one of them helps us here.

'The first is a social reason: the Court will not give a remedy that it considers to be against public policy. I shall consider in a moment whether this reason operated against the plaintiff in *Re Mahmoud*.

'The second is a human reason: the Court feels moral indignation towards the plaintiff and so refuses to lift a finger for him.[51] *Ex turpi causa non oritur actio.*[52] *In pari delicto potior est conditio defendentis.* "He who comes to Equity must come with clean hands." I submit that this in itself is a bad reason for refusing recovery,[53] and in any

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[50] Fuller & Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale L. J. 52, 373.

[51] Cp. the indignation felt by the Court towards the plaintiff and his solicitors in the highwaymen's case (1725), (1893) 9 L. Q. R. 197. In *Pasquin's case*, cited in 1 Camp. 351, an action was brought for libel; when it appeared that the plaintiff's writings were themselves libellous, Lord Kenyon 'threw his parchment at his head, and dismissed him from the Court with infamy.' 'The Court drives both parties from its presence: *procul este, profani*!': *per* MacKinnon L.J. in *Harry Parker, Ltd.* v. *Mason* [1940] 4 All E. R. at p. 202. 'The matters proved in evidence . . . were matters more apt to be discussed in a thieves' kitchen than in a Court of Justice': *per* Jordan C.J. in *Neal* v. *Ayers* (1940) 40 S. R. (N. S. W.) 16, revd. 63 C. L. R. 524.

[52] In *Beresford* v. *Royal Insurance Co., Ltd.* [1937] 2 K. B. at pp. 219-20, Lord Wright said that this maxim, 'notwithstanding the dignity of a learned language, is lacking in precise definition.'

[53] In the well-known statement of Lord Mansfield in *Holman* v. *Johnson* (1775) Cowp. 341, at p. 343, both Latin maxims are rested on public policy, and it should follow that they should not be applied when public policy requires that recovery be allowed. 'The real question at issue is whether in any particular case the ends of the law will be furthered or defeated by granting the relief asked': (1913) 26 Harv. L. Rev. 740; cp. (1931) 45 Harv. L. Rev. 187. In (1891) 25 Am. L. Rev. at p. 712, Dean Wigmore criticized the *in pari delicto* maxim, saying: 'The whole notion is radically wrong in principle and

case moral indignation is out of place where, as in *Re Mahmoud*, the plaintiff is perfectly innocent.

'The third is a prudish reason: if the plaintiff tries to give evidence of his own illegality, the Court stops its ears and refuses to hear the evidence. *Allegans turpitudinem suam non est audiendus.* In itself, and divorced from considerations of public policy, this is just as bad a reason as the second.[54] But fortunately it is not applied in all cases, and in particular it is not applied when the plaintiff is not *in pari delicto* with the defendant.[55] Thus it is irrelevant to the discussion of *Re Mahmoud.*

'The fourth is a business reason: judges are busy and highly-paid State officials, and jurors have their own important affairs to attend to. They cannot be expected to spend time investigating the disputes of individuals both of whom are acting immorally or against the social interest.[55] There is a certain amount of force in this, but it must be remembered that the time occupied in hearing the case is only one factor to be considered in deciding the general question whether public policy demands that a remedy be given. It must be remembered, too, that the giving of a remedy has an effect beyond the particular cases that come before the Courts, for it helps to regulate the innumerable cases that never reach the Courts.

'The fifth is a legal reason: "a Court is bound to obey the laws of its own Legislature or its own common law."[57] This reason has much more force when applied to statute-law than when applied to common law, for the common law is largely under the control of the Court. As regards statute law, it may be admitted that a statute that

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produces extreme injustice . . . First, one guilty party suffers, while another of equal guilt is rewarded; secondly, the penalty is usually utterly disproportionate to the offence.' Cp. Woodward, *Quasi-Contracts* (1913), § 135. See also above, note [44], and the next footnote.

[54] Consider the following cases:—(i) A man takes a lease in the name of his wife in order to defraud his creditors. There is a presumption of advancement, and the husband cannot successfully sue the wife for the restoration of the property. The only way in which he can rebut the presumption of advancement is by evidence of the fraudulent intent, and this evidence the Court will not listen to: *Gascoigne* v. *G.* [1918] 1 K. B. 223. But in *Symes* v. *Hughes* (1870) L. R. 9 Eq. 475, a plaintiff who had assigned his property in fraud of creditors was granted restitution when he was in effect suing as a trustee for the creditors. It seems, then, that the important point is not the unsavoury nature of the tale that the plaintiff has to tell (for this was the same in both cases), but the public policy of allowing recovery. (ii) If the rule stated in Salmond & Winfield, *Contracts*, 151, is correct, it seems that if A lends B a dagger for the express purpose of murdering C, A can recover the dagger from B after the murder has been committed, for he can word his statement of claim without disclosing the illegality. This particular illustration is not given by the learned authors, and it is submitted that their statement of the rule is not correct. The proper rule is not that the plaintiff can recover if he can rely on his property-right, but that the plaintiff can recover if public policy does not demand that he be penalized to the extent of losing his property. Thus, in the above example, a Court would be entitled to refuse A recovery. The requirements of public policy seem to have been ignored in *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; see also *Tenant* v. *Elliott* (1797) 1 Bos. & P. 3.

[55] Thus, if the plaintiff is not *in pari delicto* the Court will admit evidence of his illegality in order to give him a remedy in quasi-contract. Cp. Keener, *Quasi-Contracts* (1893), 274-5.

[56] Cp. *per* Deasy L.J.A. in *Hegarty* v. *Shine* (1878) 14 Cox, 145, at p. 152.

[57] *Per* Lord Wright in *Vita Food Products* v. *Unus Shipping Co.* [1939] A. C. at p. 296.

expressly provided that no action should be brought on a certain kind of contract, even though the plaintiff made a mistake of fact whereby he believed that the contract did not fall within the statutory provision, would have to be loyally applied by the Court. But no such statute ever has been passed, and it is unlikely that it ever will be. The most that a statute does in practice is to forbid a certain type of contract or declare it to be void. Now when a statute forbids the contract, the object is plainly to forbid the *carrying out* of the contract; the statute does not say that an innocent party cannot sue for damages. At first sight a statute that declares a contract to be void may seem to occasion more difficulty; but it must be remembered that even the word " void " needs interpretation, and in proper cases the Courts have construed it in a qualified way.[58] Finally, many contracts are held to be illegal as the result of a statute, not because they are expressly forbidden or avoided by the statute, but simply because they run counter to the statutory scheme of things. In such cases, as Lord Wright has pointed out,[59] the rule that the contract is illegal " is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

' If the proper consideration is one of public policy, what public policy is there against giving the plaintiff in *Re Mahmoud* the relief he asks for ? Let us remind ourselves that he is not asking for specific performance. He is asking for damages for non-performance. To compel the defendant to pay the plaintiff such damages would not be a defiance of the statutory order, nor, with all respect to the view expressed by Atkin L.J. in *Re Mahmoud*,[60] would it mean that the parties would be legally free to carry on with the performance of their contract. Nor yet would it be against public policy. That there is no public policy against awarding damages to the plaintiff in *Re Mahmoud* is proved by the fact that he could recover in tort for deceit. The doctrine of public policy reigns as much in the law of tort as in the law of contract, and if a plaintiff is allowed to recover in tort that proves that there is no public policy against allowing him to recover in contract. Is it not, then, the merest technicality to deny the plaintiff an action on the contract ?

' It may be answered that the technicality is not harmful because it does not affect a plaintiff who is properly advised and frames his claim in tort. But it is no justification for preserving pure technicalities that

58 See *New Zealand Shipping Co.* v. *Société des Ateliers* [1919] A. C. 1, for the proposition that where a contract stipulates that it shall become ' void ' in a certain event, this is read with the qualification that a party who by his own act or omission brings the event about cannot allege that the contract is void. ' The rule is that in a contract " void " is to be read as " voidable," if the result of reading it as " void " would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is " void as against him," or that if one party is in default it is " voidable at the option of the other party." The two amount to the same thing. But the contract is not " void " in favour of or " voidable at the option of " the party in default ': *per* Lord Wrenbury, at p. 15. See also Stroud, Judicial Dictionary, *s. v.* ' Void '; Benjamin, *Sale*, 7th ed., 53; *Toleman* v. *Portbury* (1871) L. R. 6 Q. B. at p. 245; *Re Hart* [1912] 2 K. B. 6; Williston, §§ 1630, 1762, n. 7, 1764.

59 *Vita Food Products* v. *Unus Shipping Co.* [1939] A. C. at p. 293.

60 Above, p. 58.

a person who is properly advised can circumvent them. Not everyone is properly advised. Moreover, an action in deceit may not be so beneficial to the plaintiff as an action on the contract. For one thing, if the defendant did not make any express representation the plaintiff in deceit will have to rely on an implied representation; and English law has been slow to admit implied representations. For another thing, a plaintiff in deceit must show that the defendant knew of the falsity of the representation. If the defendant in *Re Mahmoud* honestly thought that he had a licence when he made the representation, why should that prevent the plaintiff's recovery? The plaintiff, after all, would still be innocent, and would still have been misled by the defendant's misrepresentation to suppose that the contract was valid. Finally, the measure of damages in deceit may be altogether smaller than the measure of damages in contract. Why should not the plaintiff in *Re Mahmoud* be given damages for loss of the profit that he expected to make?[61]

'The consequences of *Re Mahmoud* seem to be serious. Suppose that A rings up a garage and orders "the Rolls Royce taxi I had last time" to come to his door forthwith. The order is accepted, but the Rolls Royce does not arrive. Is it a defence for the garage proprietor to show (1) that the particular car had no road-fund licence; (2) that the particular car had no hackney-carriage licence; (3) that none of his drivers had driving licences? Suppose that A orders tobacco and methylated spirits from the village stores, and that his order is accepted; is it a good defence to the shopkeeper in an action for non-delivery to show that he has discontinued his licences to sell tobacco and methylated spirits?[62] What have the defendant's licences to do with the plaintiff? Is the plaintiff not entitled to assume that the other party is properly licensed? Would it not impede the wheels of commerce if licences had to be mutually examined before contracts were made?[63]

'Moreover, what is to be said of contracts the performance of which would involve the commission of torts, such as where B agrees to sell C's watch to A, and B fails to get title to it at the time when the property is meant to pass under the contract? Is it seriously to be contended that B is not liable in damages to A? If he is liable, what is the difference between this case and *Re Mahmoud?* What, again, is the difference between *Millward* v. *Littlewood* and *Re Mahmoud?* The only possible differences are two. First, it may be said that the plaintiff in *Re*

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[61] It was held in *Stockdale* v. *Onwhyn* (1823) 5 B. & C. 173, that damages cannot be awarded for the loss of a profit that the plaintiff could not legally have made. But in that case the plaintiff knew of the facts giving rise to the illegality.

[62] To this it may be answered that the cases put turn on revenue statutes, and that absence of a licence required for revenue purposes does not affect contracts whether the plaintiff knew of the want of the licence or not: cp. above, p. 51, n. [3]. But as regards the methylated spirits, it may be doubted whether the requirement of the licence is purely for revenue purposes: cp. the indication of public policy in Revenue Act, 1889 (c. 42), s. 27 (4).

[63] It may be noted that where the Legislature intends a party to a contract to demand production of the other party's licence, it says so, as in the Firearms Act, 1920 (c. 43), s. 2 (3).

Mahmoud himself committed an offence under the statute; but two out of the three Lords Justices expressly treated this as immaterial. Second, the performance contemplated by the contract in the A-B-C case put above and in *Millward* v. *Littlewood* involved illegality at common law, while in *Re Mahmoud* it involved illegality by statute. Why should this make a difference? It is true that Hobart C.J., in a well-known passage, distinguished between the two kinds of illegality, likening the common law to a nursing father and statute to a tyrant;[64] but he was speaking of the effect of partial illegality, not of the plaintiff's innocence.'

The defence of Re Mahmoud *by the legal theorist*

'I have listened attentively to your argument,' said the theorist[65] to the practical man, 'and am in sympathy with much of what you say. But there is one theoretical point to which, as it seems to me, you have given insufficient attention. In order to explain this theoretical point I must go back to first principles.

'To begin with (you must bear with me if my discussion appears at first to range wide of the mark)—what is the nature of law? Many definitions have been advanced, but I propose to adopt one only, which will be adequate for my present purpose. Law is a pattern of conduct for human beings, and legal rights and duties are the lawyer's way of stating certain portions of this pattern.[66] This definition may possibly leave out some essentials of law, but I do not think that many people will quarrel with it so far as it goes.

'My next proposition is that an action for damages for breach of contract is an action for damages for *breach of a legal duty*, the legal duty resulting in this case from the general rule that there is a legal duty to perform contracts. There can be no action for damages for breach of contract unless the defendant has violated his legal duty[67]—*i.e.*, has acted contrary to the ideal pattern of conduct prescribed for him in this particular case by the rules of law. The action for damages is a sanction for the primary duty; in other words, it is a social device for persuading the defendant to perform his primary duty, and for compensating the plaintiff if he does not.

'It follows that if the defendant in *Re Mahmoud* is made liable in damages for breach of contract, this presupposes a breach of legal duty (*i.e.*, an act contrary to the legal pattern of behaviour) by him. Therefore it presupposes that it was his legal duty to accept the goods under his agreement to buy them.

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64 Quoted in *Maleverer* v. *Redshaw* (1669/70) 1 Mod. 35.

65 By this term I do not necessarily mean 'the academic lawyer.' In fact, the theoretical argument that is about to be advanced is probably the unexpressed point of view of many practising lawyers.

66 Cp. Olivecrona, *Law as Fact*, 28, 96, and *passim*.

67 'A breach of contract would not be actionable if nothing legally wrong was involved in the breach': *per* Lord Lindley in *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* [1905] A. C. 239, at p. 253; cp. Lauterpacht, 'Contracts to Break a Contract' (1936) 52 L. Q. R. at pp. 507-8.

'But we know that by virtue of the statutory order it was the defendant's legal duty *not* to accept the goods under his agreement to buy them, and that it would be a statutory offence (*i.e.*, breach of legal duty) for him to do so.

'How is it possible for these last two sentences to stand together? How can it be said that the ideal pattern of behaviour for the defendant is that he should accept the goods, and at the same time that the ideal pattern of behaviour for the defendant is that he should not accept them? It is an axiom of logic that a thing cannot be both A and not A, and in the same way a person cannot both do an act and not do it.

'"The law" (if we may so personify) must make up its mind. If it wishes the defendant to accept the goods, it surely needs to refrain from using criminal sanctions against him for doing this act, for such sanctions can only tend to deter him from doing it. If, on the other hand, it wishes him not to accept the goods, it must refrain from making him liable in damages for not accepting them. A legal system that enjoins the defendant both to accept the goods and also not to accept them can only stultify itself.

'I am prepared to admit that it is not absolutely unthinkable that the law should enjoin two contradictory courses of conduct at the same time. It is said that a short time ago there were two regulations in force in one of the Cambridge Colleges: first, that everyone should "sport his oak" when leaving his rooms, in order to check an outbreak of pilfering, and second, that no one should "sport his oak" when leaving his rooms, lest the movements of the fire squad should be hampered in an emergency. Theoretically a legal system could "enforce" (*i.e.*, punish the breach of) both such rules, though it would result in everyone being punishable. The absurdity of this result leads to the postulate of self-consistency: it is assumed that the various rules of law do not contradict each other. Where they seem to do so a reconciliation is effected by certain devices, in particular by the rule *leges posteriores priores contrarias abrogant*. Occasionally, indeed, it may happen that the individual becomes the victim of two conflicting rules, each with a legal sanction. Thus a person of double nationality may be subject to the treason and conscription laws of two different countries, and be unable to act in such a way as to satisfy both. Sometimes there may be two systems of law striving for supremacy in the same area, one enforced *de facto* by a rebel or invading government, and another recognized and enforced as the *de jure* system for the area by foreign governments.[68] In the foregoing instances the conflict is between different legal systems. But it may even happen that there is a conflict between Courts of different jurisdiction within the same legal system. In the United Stated the Federal Court may take a different view of, say, the law of Kentucky from the Courts of Kentucky itself.[69] In

[68] Cp. *Haile Selassie* v. *Cable and Wireless, Ltd.* [1939] Ch. 182.
[69] Jerome Frank, *Law and the Modern Mind*, Ch. V.

England until 1641 the Star Chamber, and until 1875 the Court of Chancery, enforced rules that conflicted with the common law;[70] though I am not aware that this conflict ever resulted in a man being punishable for one course of conduct by the prerogative tribunal and for the opposite course of conduct by the common law Court. Again, in 1840 the unfortunate Sheriff of Middlesex was sent by the House of Commons to cool his heels in the Tower, although all he had done was to obey the order of the Court of Queen's Bench.[71] Even at the present day there is an unpleasant possibility that a Court martial may punish a soldier for refusing to carry out an order to do an act that, if done, the common-law Court would punish as an ordinary offence. However, what I am really concerned to know is whether there is any instance of a conflict of rules within the same jurisdiction. Jessel M.R. once remarked that it is the duty of a good trustee to commit judicious breaches of trust;[72] but it is probable that he meant moral duty, not duty in Equity, or else that he was not using the term " breaches of trust " literally. It can hardly be supposed that there is a duty in Equity to commit a breach of duty in Equity.[73] Perhaps the most difficult case for legal theory is where (say) one English High Court judge " refuses to follow " another High Court judge. The orthodox attitude towards such conflicting precedents is that the one " is " law and the other " is not " law, but that we do not know which is which until the Court of Appeal has pronounced upon the matter. The legal mind is incapable of supposing that English law speaks with two voices at once.

' This, then, is my reason for supporting the decision in *Re Mahmoud*. I agree that there was no public policy against allowing the plaintiff to recover damages. The reason why he failed was simply the inexorable logic of the legal mind.

' I am, however, prepared to maintain that the plaintiff in *Re Mahmoud* ought to have recovered the damages for which he asked on another ground. It is well settled that where a contract is made without any thought of licences, or where it is made on the footing that one or both parties will obtain the appropriate licence in the future, the law will imply into the contract a term that the party who is required by law to obtain the licence as a condition precedent to performing his

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70 Strangely enough, Maitland, in his *Equity* (ed. Brunyate, pp. 16—18), denies that there was a conflict between law and Equity, but this is disproved by Hohfeld (*Fundamental Legal Conceptions*, p. 115 *ff*).

71 *Sheriff of Middlesex's case*, 11 Ad. & E. 273. It is not at all clear whether the sheriff is to be regarded as having broken a legal duty imposed by the House of Commons as a Court. In *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1, Patteson J. denied that the House of Commons by itself was the Court of Parliament; in the *Sheriff of Middlesex's case*, 11 Ad. & E. 273, Lord Denman C.J. said that it was unnecessary to discuss the question whether each House be or be not a Court. See also Fry L.J. in *Royal Aquarium, etc., Ltd.* v. *Parkinson* [1892] 1 Q. B. 431, at pp. 446-7; Plucknett, *Concise History of the Common Law*, 3rd ed., 131-2.

72 I quote from memory, and should be grateful for the reference.

73 Cp. *per* Farwell J. in *Briggs* v. *Parsloe* [1937] 3 All E. R. at p. 838.

contract will take reasonable care to do so.[74] This implied term is not tainted by illegality, and for breach of it the other party can sue *on the contract*. Now my contention is that when the contract is made on the footing that one or both parties already have a licence, the law is justified in implying an absolute warranty that the licence has been obtained. Or, putting the same rule more generally, when the contract is made on the footing that one or both parties are legally capable of making and performing it (*e.g.*, capable of marrying), the law is justified in implying an absolute warranty that they are so capable.[75] Such an implied term would not be tainted by illegality, and for breach of it the other party could sue on the contract. One analogy for it would be the rule in *Collen* v. *Wright* (1857),[76] to the effect that a person who purports to contract as agent for X impliedly warrants (whether it be true implied contract or quasi-contract is no matter[77]) that he has X's authority. Another analogy would be the rule in *Sheffield Corporation* v. *Barclay* (1905),[78] to the effect that where A is under a ministerial duty to act in a certain way at the request of B, and in pursuance of B's request A acts in a way that is apparently legal but really illegal, the law implies a promise by B to indemnify A against the consequences of the illegality. These are no more than analogies, but they illustrate the technique of implying a promise in order to do justice between the parties.'

The practical man's reply

'The part of your disquisition in which I was most interested,' said the practical man to the theorist, 'was the last. Since you agree with me that the plaintiff in *Re Mahmoud* ought to have recovered damages under the contract, I care not whether this be put on the ground of the defendant's breach of his promise to accept the goods, or on the ground of the defendant's breach of a superadded implied promise that he would be legally able to accept them. The measure of damages is exactly the same in either case.

'For all practical purposes that ends our discussion. But (if I may trespass upon your province for a moment) I am bound to say that I do not agree with the legal theory that you stated at the outset of your argument. For instance, suppose that B contracts to sell a specific chattel to X. He is now said to be under a duty to deliver it to X, for breach of which he is liable to X in damages. Suppose that later he

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[74] *Mertens* v. *Home Freeholds Co.* [1921] 2 K. B. 526; *Anglo-Russian Merchant Traders and John Batt & Co.'s Arbitration* [1917] 2 K. B. 679; *J. W. Taylor & Co.* v. *Landauer & Co.* [1940] 4 All E. R. 335.

[75] See above, pp. 54-5, and Pollock, *Contracts*, 10th ed., 326, n. (*u*). See also Pollock, *op. cit.*, 329, n. (*h*), 440, para. (ii). (It is not easy to see the distinction between the agreements referred to by Pollock in paragraphs (i) and (ii) respectively on p. 440.)

[76] 8 E. & B. 647.

[77] See Winfield, *Province of the Law of Tort*, 177-8. 'It [is] a contract, though implied': *per* Lord Sumner in *Edwards* v. *Porter* [1925] A. C. at p. 46.

[78] [1905] A. C. 392, at p. 399, followed in *Bamfield* v. *Goole, etc, Co., Ltd.* [1910] 2 K. B. 94, at pp. 107-8, 113-4.

contracts to sell the same chattel to A, A not knowing of the first contract.[79] B now comes under an extra duty to deliver the chattel to A, for breach of which he is liable to A in damages.[80] The second contract, though its performance would involve the breach of an existing legal duty, is perfectly valid, and B is under two inconsistent primary duties at the same time! The explanation of the apparent antinomy is simple. Legal primary duties are simply expressions of the conduct that the law desires, and it is not impossible to desire two incompatible courses of conduct at the same time. The law desires people to keep to their contracts, and expresses this in the form of a legal duty to do so. If a person is foolish enough to enter into inconsistent undertakings, the law desires him to carry out both, and although the satisfaction of both desires is impossible, there is no reason why the law should remove the usual sanctions that follow a breach of duty. Indeed, there is every reason for imposing a sanctioning liability in damages, when this will not only punish the party for putting himself in a position where he must incur the law's displeasure one way or the other, but will also serve to compensate the other party who is disappointed by the deviation from the legal pattern. The object of the law of contract is to create a sense of confidence that contracts will be performed, and to force a person who breaks a contract to recompense the other party. Now it would impair public confidence if a defendant in an action for breach of contract were allowed to plead in defence that the performance of the contract would involve him in a breach of duty, when the plaintiff did not know this at the time of the contract. Such a rule would tend to frustrate the object of the law of contract. And that is my objection to *Re Mahmoud* in a nutshell.'

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[79] If A does know of the first contract, his own contract may be void. See Lauterpacht, 'Contracts to Break a Contract' (1936) 52 L. Q. R. 494.

[80] A pretty question might arise if the agreement were to sell unique articles and both X and A sued for specific performance. Which of them would succeed? X, the first in making the contract? Or the first to get judgment? Or are the articles 'rationed' between them?

HOW ESAU SOLD HIS BIRTHRIGHT

DAVID DAUBE

WHEREVER there exists any kind of administration of justice, people will soon realize that a man who makes, or receives, a declaration has to be very careful if he wants to be quite sure of its ultimate legal effect; and the same, of course, is true of all manner of legal business. A man may believe that the promise he is giving has one meaning, but later be told by the judge that it has another; or he may enter into an agreement on the assumption of the existence of certain facts, which afterwards turn out not to be as assumed. There are many ways in which such a discrepancy between *verba* and *voluntas*, or letter and spirit, or act and intent, can come about; and a not infrequent one seems to be that the two parties to a contract wish to cheat one another. Very naturally, the temptation to take advantage of a person's lack of forethought must be particularly great in an age when it is permissible to interpret the words of an agreement in a strict and narrow fashion, and when a formal undertaking is considered valid no matter by what trickery you have been led to give it. The Spartan king, Cleomenes, concluded a truce with Argos for thirty days; but he broke it by night, the truce having been made for thirty *days*. Q. Fabius Labeo, for the Roman senate, arbitrated a boundary dispute between Nola and Naples. He interviewed the parties separately, appealed to their generosity and induced them to make substantial concessions. In the end, there was a large strip of territory left between Nola and Naples, which Labeo awarded to Rome. By the time of Cicero, both these cases were regarded as cases of fraud and as illustrating the maxim *summum ius summa iniuria*.[1] The history in Roman law of the problem of *verba* and *voluntas* has been the subject of much discussion during the past few years. I may, perhaps, be forgiven for drawing attention to a Biblical narrative which is dominated by this problem, though the commentators do not appear to have noticed it. It is the story of the sale of his birthright by Esau.

I have already pointed out in a different connection[2] that four at least of the tales of Jacob culminate in the appeal by the subtler disputant to those rigid, formalistic principles which can so often be found governing the legal or religious transactions of ancient peoples. There is, to begin with, the story of the blessing. Of his two sons, Isaac preferred Esau; it was Esau on whom he intended to confer his best blessing. But Isaac was blind; and Jacob, whose skin was smooth,

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[1] Cicero, De Officiis, I, 33.

[2] *Some Comparative Law—Furtum Conceptum*, Tijdschrift Voor Rechtsgeschiedenis, 1936, pp. 51 *ff.*

made himself hairy like his brother, by covering his hands with the skins of goats. Then he asked his father for his blessing. Isaac, indeed, touched him to make certain that it was Esau. He was misled, however, by the hairy skins of goats, and gave his best blessing to Jacob. When he discovered the truth, it was too late: the blessing once uttered was beyond recall. This is an obvious case of error as to identity, an error, moreover, induced by sheer fraud; yet it pays the deceiver to deceive, since what he obtains in the proper form cannot subsequently be taken from him. None the less, Jacob went not unpunished. Nemesis ordained that he himself should be tricked into an error as to identity and have to abide the result. For seven years he served Laban, being promised the hand of the latter's younger daughter, the lovely Rachel, as his reward. At last the wedding-feast was celebrated; but at night, when he was to receive his bride (no doubt with her veil lowered, according to oriental custom), Laban substituted his elder and less beautiful daughter. In the morning Jacob found himself irrevocably bound to Leah. The structure of this case is strangely similar to that of the case of the blessing. It is safe to assume that the original audience did connect the two stories and enjoy so striking an instance of exact retaliation.[3]

In the other two narratives here to be adduced the point is the deriving advantage from a strictly—and artificial—literal interpretation of a contract or statement. Some time after Jacob's wedding, a new arrangement was made between him and his father-in-law. Jacob agreed (most generously, it seemed to Laban) to continue looking after Laban's flocks without getting any share of them. One thing only he demanded. All spotted goats should be removed from the main stock (it would be very few, the Syrian goats being nearly all brown); they should be kept at a distance of three days' journey and be taken care of by Laban himself, in order to make impossible any inter-breeding between them and the main stock; if after that any spotted goats were born amongst those entrusted to Jacob—an extremely unlikely contingency—they should be his. Jacob carefully observed the letter of the agreement. He never laid hands on a brown goat; he never coupled the brown goats with spotted ones. Yet, by some clever devices, such as placing coloured rods in the drinking troughs during the breeding season, he caused the strongest of Laban's animals to bring forth spotted kids. As the contract, or rather, the express words of it, did not provide against this, Laban could only look on helplessly. Eventually Jacob fled from his employer, taking his family with him; and in the course of the negotiations that followed, he once more benefited by the fact that it was the letter of a declaration, not its apparently natural meaning, which counted. As she was running away with her husband, Rachel carried off her father's idols. Laban after a hot pursuit overtook the

[3] They may well have chuckled even over such details as that whilst Jacob's stratagem was to act his elder brother, he in his turn was deceived by Leah's acting her younger sister.

fugitives and accused them of theft. Jacob, however, vehemently repudiated the charge, swearing: 'With whomsoever thou findest thy gods, he shall not live.' A terrible curse this was. Yes; but, as the Bible repeats no less than three times, Laban was not able to *find* the idols. The curse consigning to death him with whom they were *found* could not, therefore, produce any ill effects.

It is submitted that the story of the acquisition by Jacob of Esau's birthright belongs to the same class as the four episodes discussed.[4] For what we have before us is a case, not merely of squeezing a famished man (as is generally supposed), but also of dishonesty, of consciously profiting by an error of the other party. According to the commentaries, Esau returned from the hunt hungry and weak, and Jacob availed himself of this opportunity to extort from him his birthright for some paltry lentil soup. But this cannot be all.[5] The current interpretation, while correct so far as it goes, leaves four points uxexplained. (1) Why did Esau not ask for the lentil soup by name? He asked for 'that red dish.' The explanation sometimes offered that he was so greedy as to be unable to utter the words 'lentil soup' does not seem good enough. (2) Why are we not told in the first part of the story that the dish in question was lentil soup? It is right at the end that the nature of the dish is described. No real explanation of this odd feature has been attempted. (3) Why did Esau repeat the word 'red'? If we translate literally, he asked for 'that red, red dish.' Minor and major emendations of the text have been proposed, but they are all—emendations.[6] (4) Above all, why did Esau remark on a later occasion (namely, on discovering how Jacob had obtained their father's blessing) that Jacob 'had overreached him twice,' once when he took from him his birthright and another time when he secured the blessing? On the usual interpretation, Jacob did not resort to fraud when he made Esau part with his birthright. Yet, the Hebrew verb here rendered by 'to overreach' distinctly refers to sly and crooked behaviour. Moreover, Esau himself paired off the case of the birthright with that of the blessing as though the essential features were the same. No solution of the difficulty has been advanced.

Let us briefly examine the story. An introductory note informs us that Esau was a huntsman, fond of venison, whereas Jacob was an

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[4] There is yet a further narrative worth mentioning in this connection, which, though the case recorded is neither one of error nor one of strict interpretation, does clearly presuppose the absolute validity of solemn pronouncements. I am referring to Jacob's wrestling, in a lonely night, with a mysterious stranger. Towards morning, the stranger asked Jacob to let him go (spirits of the night must vanish at dawn). Jacob, however, held him fast till he had extracted a blessing from him. The blessing was none the less valid for being given under duress.

[5] Even if it were, the narrative would still furnish an example (somewhat parallel to that considered in the preceding footnote) of a declaration being valid though made under great stress.

[6] In this case emendation seems particularly rash, since, according to the Bible, it was because of his use at that juncture of the word 'red,' 'adom' ' that Esau received the name 'Edom.

ordinary shepherd. After this, the main part of the tale begins. One day Jacob boiled a certain dish: he had hardly finished when Esau arrived in a state of exhaustion and begged to be allowed ' to gulp some of that red, red food.' As observed above, he did not call the dish by its name, nor, at this stage, is there any remark in the narrative to enlighten us, the readers, on the subject. It is reasonable to conclude that Esau was ignorant of the nature of the dish; and that, at this stage, we also, the readers, are not meant to know (though, indeed, we are meant to suspect) that something is wrong. What, then, did Esau think Jacob was preparing ? Red, in Hebrew literature as in most others, is the colour of blood.[7] The Hebrew word for ' red,' in particular, is not only etymologically connected with that for ' blood,' but also of a very similar sound. Esau, in his request, repeated the word. In fact, the word being 'adom, he was called 'Edom, the Bible says, for ever after. It must have been the colour of blood that struck him and roused his desire. It should be noted that he asked, not to be given ' to eat ' or ' to drink,' but to be given ' to gulp.' The Hebrew word suggests bestial wildness. Besides, we have been told at the beginning of the story that Esau was greedy of venison. Evidently, he thought that Jacob was preparing a blood-broth (the fare, it may be recalled, of the Spartan warriors[8]).

Whether Jacob merely made the best of an unexpected chance, or whether (as is more likely) he had already planned the fraud when he started cooking the dish, is of small moment. Next in the narrative comes the preliminary agreement. Jacob said Esau might have the dish, provided he would give his birthright in exchange; and Esau replied that he had no objection to this bargain. With this informal agreement, however, Jacob was by no means yet content. Esau, he insisted, must renounce his birthright by a solemn oath; indeed, he must take this oath before he could have his meal. This little incident is not without significance. Had Jacob been satisfied with a purely informal agreement, Esau, it is to be supposed, would have made no scruple, so soon as he noticed the swindle, to declare the whole transaction null and void. But an oath, Jacob knew, would remove any danger of this sort; it would lift the contract into the realm of the absolute; and Esau's promise would stand regardless of the means used in eliciting it. One is reminded of the famous instance of *dolus* recorded by Cicero.[9]

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[7] Isaiah, 63. 2; II Kings, 3. 22.

[8] We must not ask why Esau, if he thought it was blood-broth, did not explicitly state that he wanted blood-broth. For had he done so, there would have been no story to tell: the word ' blood-broth ' would have appeared in the agreement, and Jacob in that case could not of course, have performed his part by serving lentil soup. As it was, Esau bought ' that red, red dish,' when, on the letter of the contract, Jacob's position was safe. One need only glance through Dr. Glanville Williams' *Advice to Shoppers*, The Law Journal, 1941, with his injunctions ' Do not point, buy by description, state fully the purpose for which you require the article,' to see what an enormous difference it would have made if Esau had expressed himself more accurately and how shockingly careless he was.

[9] De Officiis, III, 58 *f.*

The owner of a villa on the shore of a lake invited a prospective buyer. On the day of the visit, he got a large number of people to row about on the lake pretending to be catching fish, and the guest declared himself ready to pay a high price for the house. A simple, informal sale, however, was not what the owner wanted. For sale gave a so-called *bonae fidei iudicium :* this meant that, in any law suit arising out of a sale, the judge would have to take into account not only the agreement itself, but also the accompanying circumstances, and to deliver the fairest decision possible. The fraudulent vendor of the villa, therefore, could never, on the basis of a mere informal sale, have succeeded in enforcing payment. For this reason he suggested to the buyer that they should at once confirm the sale by a formal ' literal contract.' A ' literal contract ' gave a *stricti iuris iudicium ;* it was a transaction, that is, which (at any rate, at the time when the case under notice occurred) had to be treated by the judge as fully valid even if it had clearly been brought about by fraud. The visitor agreed thus to confirm the sale. Accordingly, though it did not take him long to detect that there was no fish in the lake, he had no choice but to pay the sum promised.

Esau swore the oath as required. Only now do we learn, only now did he learn, what Jacob had in his pot: lentil soup. So it was for that that he had bartered away his birthright. The complete silence of Esau upon finding himself outwitted, and his doing nothing but very ordinary actions, are most impressive and almost introduce into the story a touch of the tragic.[10] But there was no redress for him. Well might he remember this piece of deception when Jacob later overreached him once again and snatched the blessing that ought to have gone to the huntsman. On that coupling by Esau of the two cases, incidentally, a word may here be added. We have seen that in both stories, that of the birthright as well as that of the blessing, the misleading a man in order to profit by his error is a prominent feature. Regarding the question what exactly was the type of error committed, it is true, modern text-books would distinguish. Isaac's error when blessing Jacob, as has already been noted, may be described as an error as to the identity of the person before him. Esau's, on the face of it at least, was an error as to the qualities of the subject-matter of the contract. It is highly doubtful, however, whether this distinction played any part in the minds of the old hearers of these tales. To them, if they speculated on the point at all, it may well have appeared that, fundamentally, it was a matter of simulation, assuming another person's identity, both times. That they must have classed as simulation Jacob's conduct in the affair of the blessing, when he presented himself as Esau to his blind father, is obvious.[11] But it should be

[10] There is an interesting stylistic parallel to this, ' and he ate and drank and rose and went, and thus Esau despised his birthright,' in I Samuel, 28, 25. The narrative of Saul's visit to the witch of Endor, full of the most dramatic events, there ends with the words, ' and they ate and rose and went in that night.'

[11] Needless to repeat, the case of Leah replacing Rachel in the night of the wedding is precisely analogous.

remarked that Jacob, in a sense, adopted the guise of Esau even when, in the affair of the birthright, he had to deal with Esau himself. He made what resembled a blood-broth, the kind of dish that would normally be prepared by Esau, who had an immoderate craving for it. It may be said that Jacob seemed to be hairy, like his wild brother, when he asked Isaac for his blessing; he seemed to be boiling a blood-broth, in the manner of his wild brother, when he bought the birthright from that very brother. This close analogy may, indeed, be due to mere coincidence. But I am much more inclined to think that we can trace through it a very ancient idea; and that in both stories is reflected the same belief in the virtue of imitation, the belief, namely, that, by acting another person, you can succeed to his place.

In conclusion, a word of warning may be useful. No greater mistake can be made than to argue that, since the narrative here reviewed invariably leads up to the triumph of the party abusing certain formalistic principles of law, the characters described, and even the authors of the descriptions, must have been primitive men who did not see the flaws in their system. The exact opposite is true. The impostors celebrated in these anecdotes knew very well what they were doing, their victims how they had been trapped, and the story-tellers what elements formed the mainspring of the plot. The mere fact that such incidents were taken note of and handed down, as tragedies or comedies, from one generation to the other, is sufficient proof of this; and it is doubly proved by the very subtle manner in which the tales are told. Those people were wide awake to the problem of *verba* and *voluntas* and similar difficulties. The proper question for us to pose is not, ' Why did they not see that there might be an alternative to that strict, pedantic kind of law ? ' (though this seems the usual question to ask nowadays, explicitly or implicitly), but, ' Why did they apply, in some branches of the law at least, those strict, formalistic principles although they were fully aware of the possibility of unjust results ? ' It is not intended here to attempt an answer.

THE UNBORN CHILD *

P. H. Winfield

SOME years ago the position of the unborn child in the English law of tort attracted my attention and it is chiefly in connection with that branch of the law that I wish to discuss the topic. But, as almost invariably happens in legal research, I soon found that there were other aspects of the subject which at least deserved passing notice, and at most might be useful for analogy with or distinction from the aspect in tort. It is the old tale of going out to catch a whale and landing several other fish in the process. The three other branches of the law with which I made contact were the law of property, criminal law and the law of contract. I shall touch upon these, but I have no intention of investigating them in detail. There are plenty of books which cover the topic in Property Law and Criminal Law respectively. In the law of contract there is a significant blank. The order of discussion in this article will be:—

I—*The law of property.*
II—*Criminal law.*
III—*The law of contract.*
IV—*The law of tort.*[1]

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[1] I am much indebted to my learned friend, Dr. K. Lipstein for the references to Continental law, and to my learned friend, Dr. Glanville Williams, for the following references to some of the periodical literature, some of which is unfortunately not available in any of the leading English law libraries: A. B. Frey in 12 St. Louis Law Review (1927), 85—95; 83 Solicitors Journal (1939), 185 (pre-natal injury); Stanley B. Atkinson in 20 Law Quarterly Review (1904), 134—159 (life, birth and live-birth); 30 American Law Notes (Jan. 1927), 183—184 (*Stanford* v. *St. Louis-San Francisco Ry. Co.*, 214 Ala. 611); R. Straub in 33 American Law Notes (Feb., 1930), 205—210 (right of action for pre-natal injury); 9 Riv. di diritto privato (1939), 76 (viability of infant at time of injury); 31 Columbia Law Review (1931) 710—711 (procedural status of unborn infant); W. H. Anderson in 14 Tennessee Law Review (April, 1936), 151—162 (rights of action of unborn child); G. W. Andrews, jr. in 2 Alabama Law Journal (July, 1927), 259—261 (*Stanford's case, supra*); 1 Alberta Law Quarterly Review (1935), 166—167 (*Leveille's case ;* see discussion on pp. 85, 86 of this article); 33 Michigan Law Review, 414 (law of property); the discussions of *Magnolia Coca Cola Bottling Co.* v. *Jordan* (Tex.), 47 S. W. (2nd), 901, in 46 Harvard Law Review (1932), 344—345; 27 Illinois Law Review (Dec. 1932), 461—462; 20 Minnesota Law Review (Feb. 1936), 321—322; 11 Texas Law Review (Ap. 1933), 396—397; Comments on *Villar* v. *Gilbey* [1907] A. C. 139, in 23 Law Quarterly Review (1907), 254; 24 Law Quarterly Review (1908), 2; discussion of *Elliot* v. *Joicey* [1935] A. C. 209, in 13 Canadian Bar Review (1935), 594—601; 9 Australian Law Journal (1935), 294. See also Mr. J. V. Barry's article on The Child *en Ventre sa Mère*, 14 Australian Law Journal (Feb. 14, 1941), 351—357.

I—The Law of Property

There is a fiction that a child *en ventre sa mère* is a person in being for the purposes of (1) acquisition of property by the child itself, or (2) being a life chosen to form part of the period in the rule against perpetuities.[2] The principle is well settled now, although the older authorities show some disagreement.[3] In (1), the basis of the rule is not that in a gift to 'children' the natural or ordinary meaning of 'children' is such as to include a posthumous child, but that an artificial sense must be given to the word, because 'the potential existence of such a child places it plainly within the reason and motive of the gift';[4] this is, of course, assuming that the donor has not expressed or implied in the document an intention to confine the gift to children living at the date at which the gift takes effect. To put the matter in another way, if the donor had thought about it at all, he would almost certainly have said that he wished to include his posthumous children among the beneficiaries. There is no fiction as to his intention, but the law can give effect to that intention only by the fiction that the child *en ventre sa mère* is actually born, provided it is in fact subsequently born alive.

The fiction is applicable in (1) only if it is for the benefit of the child, not where it may be detrimental to him.[5] But in (2), *i.e.*, in connection with the perpetuity rule, the fiction holds whether it be for the advantage of the unborn child or not.[6] Even with respect to the benefit in (1), it must be for the child's *direct* benefit; *e.g.*, if there be a gift to X for life, with a limitation over to X absolutely if X leave issue, but, if he leave none, then to Y, and if X die leaving a child *en ventre sa mère*, the property will go to Y; for the gift conferred no direct benefit on X's child unborn at X's death. Such was the decision of the House of Lords in *Elliot* v. *Joicey*,[7] and it evoked a considerable amount of adverse criticism.[8]

II—Criminal Law

Here the recognition of the unborn child appears in several offences. Since these crimes vary in gravity as well as in nature, different criteria have been adopted in them as to the meaning of 'unborn.' We must consider separately (1) homicide, which, in its various forms, remains in all essential respects a common law crime; (2) statutory offences.

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[2] 25 Halsbury, Laws of England (2nd ed., 1937), 88, and authorities there cited.

[3] See Viner, Abridgment, vol. 9 (2nd ed., 1792), pp. 403—404 (Title 'Enfant (H. 8) En Ventre sa Mère'); Cruise, Digest, vol. 6 (2nd ed., 1818), Index, 178 ('Infant in ventre matris'); note that the reference to 'may be a devisee' is wrongly given as 'VI, 16'; it should be 'VI, 19.' Many authorities are cited in the arguments and judgments in *Doe* d. *Lancashire* (1792) 5 T. R. 49.

[4] Leach V.-C. in *Trower* v. *Butts* (1823) 1 S. & St. 181, 184; cited with approval by Lord Russell of Killowen in *Elliot* v. *Joicey* [1935] A. C. 209, 218.

[5] *Blasson* v. *Blasson* (1864) 2 De G. J. & S. 665; approved in *Villar* v. *Gilbey* [1907] A. C. 139, and *Elliot* v. *Joicey* (last note).

[6] *Re Wilmer's Trusts* [1903] 2 Ch. 411.

[7] [1935] A. C. 209.

[8] 52 Law Quarterly Review (1936) 1—3; 13 Canadian Bar Review (1935) 594—601; 9 Australian Law Journal (1935) 294.

(1) *Homicide*

Murder or manslaughter cannot be committed unless the killing is of a person 'in being.' The phrase has received a good deal of judicial interpretation in modern times. In early times, he who procured abortion, by striking or poisoning the mother while she was pregnant, committed homicide, provided the foetus was formed and living *in utero*.[9] But in 1327 it was held otherwise. A man beat a woman while she was *enceinte* of two children. One was still-born, the other survived to be baptized, but died two days thereafter from the pre-natal injury. This was held not to be felony.[10] Further, in 1348 it was decided that an indictment for killing a child *en ventre sa mère* was bad, because there was no baptismal name mentioned in the indictment, and also because it was hard to know in such a case whether it was the accused who caused the death.[11] Staunford, in following this in his *Plees del Coron* (first published in 1557),[12] considered the first reason baseless, but his approval of the second reason is interesting in that it anticipates the toughest knot in cases of this type in both criminal law and the law of tort. This difficulty as to evidence connecting the injury with the death did not trouble Coke, who stated the law thus: 'If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.' Coke added that the case of 1327 (*supra*) 'was never holden for law.'[13]

By Coke's time, therefore, the common law as he stated it stood thus:—

(i) Killing a child in the womb was a crime, but it was a misdemeanour ('misprision'), not a felony.

(ii) If the child were born alive and afterwards died of the pre-natal injury, it was murder.

We must develop these two propositions separately.

(i) Later writers accepted Coke's view.[14] It must be subdivided into two distinct rules:—

(*a*) Killing a child in the womb is not murder. But that raises the question, 'When does the child cease to be *en ventre sa mère?*' The

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[9] Fleta, Bk. I, c. 23, § 10, reproducing and clarifying a vague and obscure passage in Bracton (ed. Woodbine, 1922), f. 121.

[10] Y. B. Mich. 1 Ed. III, f. 23, pl. 18; 3 Lib. Ass. pl. 2.

[11] Fitzherbert, Abridgment, Corone, 263, citing Mich. 22 Ed. III, without further details.

[12] Bk. I, c. 13.

[13] 3 Inst. 50.

[14] Hale, Historia Placitorum Coronae (ed. 1778), I, 433; Hawkins, Pleas of the Crown (6th ed., 1777), I, 121; Blackstone, Comm., IV, 198; East, Pleas of the Crown (1803), I, 227—228; Chitty, Criminal Law, III (2nd ed., 1826), 800, where the third count in an indictment is, in effect, for procuring abortion.

older writers are of no assistance on this point, but several nineteenth and twentieth century cases supply an answer to it. The child is not in being so as to make killing of it homicide unless it ' is carrying on its being without the help of the mother's circulation.' This test was adopted by Wright J. in *R.* v. *Pritchard* (1901),[15] and it had been recognized between sixty and seventy years earlier in other decisions.[16] It makes irrelevant the question whether the child had breathed or not. For, on the one hand, ' its having breathed is not sufficiently life to make killing of the child murder,'[17] and, on the other hand, it does not follow that the child is not born alive because it has not breathed; it is enough that it had a separate circulation.[18] This separate circulation is possible although the umbilical cord has not been severed.[19]

(*b*) Killing a child in the womb is a crime, although it is not homicide. Here, statutes have, for a long time, made it needless to rely on the common law. The one now in force is the Offences against the Person Act, 1861,[20] to which we shall refer under ' (2) Statutory Offences,' *post.*

(ii) As to this, writers subsequent to Coke accepted with some hesitation his opinion that, if the child were born alive and afterwards died of the pre-natal injury, it was homicide.[21] Later decisions confirmed this as law, and they throw some light on the problem, which was not discussed in detail by any of the older writers, ' When is a child born for this purpose ? '

In *R.* v. *Senior* (1832),[22] the head of the child had extruded from its mother's womb, and the surgeon in charge of the delivery was so grossly incompetent that he crushed the skull of the child so that it died immediately after birth. The surgeon was convicted of manslaughter, and the conviction was unanimously upheld. In *R.* v. *West* (1848),[23] the jury were directed that if, as a result of an attempt to procure abortion, the child were born prematurely so as to be much less capable of living, and if in fact it dies in consequence of this earlier exposure to the world, this would be murder. The jury were evidently not satisfied that this consequence was established, for their verdict was ' Not guilty.'

It will be noticed that in R. v. *Senior* the child had no circulation independent of that of its mother at the date of the injury to it. The case is, however, quite consistent with the test fixed in *R.* v. *Pritchard* (*supra*) that the child must have a separate circulation before it is possible to commit homicide of it. In *R.* v. *Senior* it was necessary

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15 17 T. L. R. 310.

16 *R.* v. *Enoch* (1833) 5 C. & P. 539; *R.* v. *Wright* (1841) 9 C. & P. 754.

17 *R.* v. *Enoch* (last note). So, too, *R.* v. *Poulton* (1832) 5 C. & P. 329, and *R.* v. *Sellis* (1837) 7 C. & P. 850. Brett J.'s direction in *R.* v. *Handley* (1875) 13 Cox, 79, 81, implies that separate breathing of the child is enough; but this cannot now be regarded as law.

18 *R.* v. *Brain* (1834) 6 C. & P. 350.

19 *R.* v. *Trilloe* (1842) 2 Moody, C. C. 260; *R.* v. *Reeves* (1839) 9 C. & P. 25. Parke B. had left this point open in *R.* v. *Crutchley* (1833) 7 C. & P. 814.

20 24 & 25 Vict. c. 100, ss. 58, 59.

21 See the authorities cited in note [14], *ante.*

22 1 Moody, C. C. 346.

23 2 C. & K. 784, 788.

to prove three things: (*a*) The pre-natal injury; that was established by the crushing of the skull. (*b*) Birth of the child. (*c*) Death after birth, in consequence of the pre-natal injury. Both (*b*) and (*c*) were also proved. Thus, in cases of the type of *R.* v. *Senior*, there is always a period of time between the injury and the resulting death, and during that period the child must have been born alive. Nor has it been born alive unless it has had a separate circulation. But in cases of the type of *R.* v. *Pritchard*, death is always inflicted *uno ictu*, and the problem is whether that *ictus* was inflicted before birth or after birth. If it were before birth (*i.e.*, before the child had a separate circulation), then infliction of death was not homicide; if after birth, then it was homicide.[24]

(2) *Statutory Offences.*

These include:

(i) *Procuring abortion.*—Older statutes dealt with this, and the law is now in the Offences against the Person Act, 1861,[25] which makes it a felony punishable with penal servitude for life. No decision appears to have been recorded which raised the question whether the child had been born or not.

(ii) *Concealment of birth.*—Where a mother was suspected of killing her illegitimate child, it was realized long ago that the nature of the act would make it difficult to prove whether the child were killed before or after the birth and therefore to establish that it had been murdered. In 1623, a statute met this by creating the crime of concealment of birth; it was punishable with death.[26] The present law is in the Act of 1861 (*supra*), s. 60. If a woman is delivered of a child, whether legitimate or illegitimate, any one who, by a secret disposition of its dead body, whether the child died before, at or after birth, endeavours to conceal its birth, is guilty of a misdemeanour punishable with two years' imprisonment. The only cases on the interpretation of the various statutes, which are relevant to this essay, are concerned with the question whether the child had begun life at all *en ventre sa mère*, *i.e.*, whether it were ' at that stage of maturity at the time of birth that it might have been a living child,' for unless it had reached that stage, the offence cannot be committed, and Erle J. told the jury in the case from which this passage is quoted—*R.* v. *Berriman* (1854)[27]—that, although no specific limit could be assigned to the period when the chance of life begins, yet it might perhaps be safely assumed that, under seven months from conception, the child will not be born alive. In 1864, Martin B. directed the jury that a fœtus the length of a man's finger, which had been produced in the fourth or fifth month of pregnancy was a ' child '

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[24] See the authorities cited in note [14], *ante*, and add to them *R.* v. *Izod* (1904) 20 Cox, 690.

[25] 24 & 25 Vict. c. 100, ss. 58, 59.

[26] 21 Jac. I, c. 27.

[27] 6 Cox, 388, 390.

for this purpose, but added that he would reserve the point for the Court for Crown Cases Reserved in the event of conviction. The verdict, however, was 'Not guilty.'[28] But two years later Smith J. left it to the jury to say whether the offspring had so far matured as to have become a child.[29]

(iii) *Infanticide.*—By the Infanticide Act, 1922,[30] where a woman wilfully causes the death of her newly-born child, but has not at that moment fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind is disturbed, the offence may be dealt with as if she had committed manslaughter. There are decisions on the statute explanatory of 'newly-born,'[31] but none on whether there had been birth at all.

(iv) *Child destruction.*—This felony, punishable with penal servitude for life, was created by the Infant Life Preservation Act, 1929.[32] The offence is committed by any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes the child to die before it has an existence independent of its mother. For the purposes of the Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be proof that she was at that time pregnant of a child capable of being born alive. Here, again, there is no reported decision on the Act which concerns us. The same remark applies to criminal statutes relating to neglect and ill-treatment of children,[33] and to the requirement of the law that notification of birth is compulsory, whether the child is born dead or alive.[34]

Fuller information on the legal answer to, 'What constitutes birth?' will be found in Mr. Stanley B. Atkinson's article on 'Life, Birth and Live-Birth,' in 20 Law Quarterly Review (1904), 134—159; and, on the medical answer, in Taylor's Medical Jurisprudence (9th ed. 1934), II, 173—215. Physiology supplies no one complete test, and the law can scarcely be blamed for taking its own line (as in *R.* v. *Pritchard*[35]) and selecting one definite fact as conclusive evidence of birth.

Bearing in mind that our chief object is to consider liability in tort for pre-natal injuries, and that we have investigated English criminal law only to see what help it can give us by way of comparison, the result is this. Criminal law has shown steady progress in its efforts to protect the unborn child, and it includes several offences against such a child. It has encountered considerable trouble in determining whether a child

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[28] *R.* v. *Colmer*, 9 Cox, 506.
[29] *R.* v. *Hewitt* (1866) 4 F. & F. 1101.
[30] 12 & 13 Geo. V, c. 18.
[31] *E.g.*, *R.* v. *Donoghue* (1928) 97 L. J. K. B. 303.
[32] 19 & 20 Geo. V, c. 34.
[33] Russell on Crime (9th ed., 1936), I, 595 *seq.*
[34] Public Health Act, 1936 (26 Geo. V & 1 Ed. VIII, c. 49), s. 203, sub-s. (7).
[35] (1901) 17 T. L. R. 310; *ante*, p. 79.

is or is not born. Among the offences is pre-natal injury to a child which, after it is born, is the cause of its death. This is homicide. In *R.* v. *Senior*,[36] the evidence of the pre-natal injury and of the consequent death was clear. But no case of this kind seems to have been reported in which there was a debate whether the causal connection between injury and death could be proved. This, as we shall see, is the crux of the matter in one branch of the law of tort as well as in the law of homicide.

III—The Law of Contract

I can think of no case in which contract is possible on the part of an unborn child.

Suppose that a fund of money will become his on birth, that his mother is authorized to defray his layette and the expenses of her confinement out of that, and that she orders cradle and garments for the baby before its birth and employs a surgeon to attend her during her confinement. Can it be said that she is contracting as agent for the unborn child ? I think not. What has really happened is that the money of the child is impressed with a trust or liability in favour of its mother to the extent of what she is authorized to expend on its behalf. The contracts which she makes are made on her own account, though the source from which she meets those contractual liabilities is the child's fund. Moreover, it seems wrong to postulate agency in a case where the principal has no opportunity of choosing whether he will or will not be principal, or of ratifying within any reasonable period what the agent does on his behalf. True, the lunatic or minor has no such choice, and for centuries the law has recognized their need for agents.[37] But the circumstances must be such that the lunatic or minor would have been bound if he himself had made the contract. With the unborn child the difficulty is whether he could have made the contract. He may have been a monster and not a child at all, or there may have been more than one of him or her. Suppose triplets are born, how can you be sure that they would all have made the same contract ? The contract might have suited one, but not the other two.

IV—The Law of Tort

So far as English law goes, we have no direct decision whether an action in tort is maintainable for pre-natal injuries.

Under the Fatal Accidents Act, 1846,[38] it has been held that a child *en ventre sa mère* is considered as born for the purposes of sharing in the damages awarded for the death of the father caused by the wrongful conduct of the defendant; but until the child is born, its claim cannot

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[36] (1832) 1 Moody, C. C. 346; *ante*, p. 79.
[37] Bowstead, Agency (9th ed., 1938), 4—5.
[38] 9 & 10 Vict. c. 93.

be preferred.[39] So, too, under the Workmen's Compensation Acts,[40] a child *en ventre sa mère* has been held to be a ' dependant ' of its deceased father in respect of compensation claimed for his death.[41] But in these decisions there was no question of a tort having been committed against the child itself. The child was simply one of a group of persons designated by the Legislature as entitled to share in damages awarded for a wrong done to the father.

In *Dulieu* v. *White*,[42] the facts were as follow. The plaintiff was the wife of a publican and was pregnant. She was behind the bar in her husband's public-house. The defendants' servant negligently drove a van into the public-house. The plaintiff consequently sustained a severe shock and was so ill that her child was prematurely born; it was also born an idiot. The plaintiff sued for the injury to herself, and the defendants pleaded that the statement of claim disclosed no cause of action, as it was founded upon nervous shock. The Court (Kennedy and Phillimore JJ.) held that the defence was bad. As to the child, counsel for the plaintiff said, ' I do not allege the injury to the unborn child as a cause of action, but merely in aggravation of damages.'[43] Neither of the learned judges made any reference to this aspect of the case; but it must be remembered that the case was presented to them purely on a preliminary point of law—whether nervous shock would sustain an action at all—and there was thus no reason why they should have considered the injury to the child.

In 1939, a case occurred at Liverpool Assizes, which is noted in 83 Solicitors' Journal, 185, but is not further or elsewhere reported. By the negligence of the defendants a ladder fell upon Mrs. D, the plaintiff, while she was walking in the street. She was pregnant at the time and as a result of the accident the child was born next day and lived only one day. The defendants settled the action by paying £100 into Court

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[39] *The George and Richard* (1871) L. R. 3 Ad. & E. 466. To the like effect is a decision of the Victorian Supreme Court: *Mann* v. *Carlon* (1940) V. L. R. 280; 26 A. L. R. 184 [cited in 14 Aust. L. J. at p. 356 (J. V. Barry's article).] A learned friend has suggested to me that the Fatal Accidents Act creates a right of action in tort in favour of the unborn child itself. The Act itself certainly does not do so. There are *dicta* in the decisions interpreting the Act that it creates a new cause of action, and in *Nunan* v. *Southern Ry.* [1924] 1 K. B. 223, 227, 229, all three L.JJ. in the C. A. said that the dependants of the deceased have a new and distinct action (*i.e.*, distinct from that which deceased would have had). But this went farther than anything said in earlier decisions, nor is it consistent with the undoubted law (admitted in the same decision) that if the action by the deceased would have been barred, supposing that he had survived to sue it, by the statute of limitations or by his own contributory negligence, then there is no action under the Fatal Accidents Act. In view of this uncertainty as to the exact sense in which the action is distinct from that which the deceased could have maintained, and much more in view of the fact that Phillimore J., in *The George and Richard* (above), expressly said that it was the deceased's *representative* who acquired the new right of action, it would be unsafe to infer that it is the unborn child who acquires it.

[40] The principal Act is now 15 & 16 Geo. V, c. 84 (1925).

[41] *Williams* v. *Ocean Coal Co., Ltd.* [1907] 2 K. B. 422. In *Orrell Colliery Co.* v. *Schofield* [1909] A. C. 433, this was extended to posthumous illegitimate children; so, too, *Harris* v. *Powell Duffryn Steam Coal Co., Ltd.* (1915) W. C. & Ins. Rep. 527.

[42] [1901] 2 K. B. 669, 671; in some respects the report in 85 L. T. 126, is better.

[43] 85 L. T. at p. 127.

which was accepted by the plaintiff and her husband as administrators of the child. The claim must, therefore, have been under the Law Reform (Miscellaneous Provisions) Act, 1934,[44] which provides that all causes of action subsisting against or vested in any person on his death shall survive against or, as the case may be, for the benefit of his estate. The judge approved the settlement, which thus obviated the hearing of the action; and it is evident from a remark which he made, that he considered the point as to pre-natal injury would have given him some trouble. The learned annotator of the case adverts to the difficulty of keeping an action, if one were allowed, in suspended animation until the child were born, but he adds that much the same difficulty might arise with regard to torts actionable only on proof of special damage. Yet there is no doubt that this would not bar actions with respect to them.

In some older property cases there are broad general statements like the following. In *Doe* d. *Lancashire* v. *Lancashire*,[45] Grose J. said: 'I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's lifetime, that does not equally extend to a posthumous child.' In *Doe* d. *Clarke* v. *Clarke*,[46] Buller J. approved the following statement: 'It is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mère* shall be considered as absolutely born.'

But, quite apart from the fact that these *dicta* occur in property cases, they were wider than was needed for the decisions in them, and it would be unsafe to regard them as covering liability in tort, for in fact neither judge was putting his mind to a case of pre-natal personal injury, although the idea of injury to the property of an unborn child may have been in their thoughts; that, however, is only speculation.

Even more rash would it be to argue to liability in tort from similar generalizations based upon the civil law.[47]

That is the sum of what I can find in English law on the problem of tort. Let us turn to other British jurisdictions. In two of the British dominions in which the common law prevails we have two decisions which are directly in point, one in Ireland and one in Canada. They are opposed to each other. Neither, of course, has more than persuasive authority in an English Court.

The Irish case is *Walker* v. *G. N. Ry. of Ireland* (1890).[48] A child was born crippled and deformed after an accident to its mother while she was *enceinte* of it and was travelling on the defendants' line. The accident was due to their negligence. The defendants were held not liable to the child. All four judges based their decision on the ground

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[44] 24 & 25 Geo. V, c. 41.

[45] (1792) 5 T. R. 49, 63.

[46] (1795) 2 H. Blackst. 399, 401.

[47] *E.g.*, Lord Hardwicke L.C. in *Wallis* v. *Hodson* (1740) 2 Atk. 114, 118.

[48] 28 L. R. (Ireland), 69.

that the defendants owed no duty of care towards the child; not in contract, because there was none with respect to the child; not in tort, because the defendants, not knowing of the existence of the child, could not be said to have received it as a passenger.[49] O'Brien J. also put forward another reason, although he did not regard that as conclusive. That was the difficulty of proof. It would be going too far to say that science ' could trace a hare-lip to nervous shock, or a bunch of grapes on the face to fright.'[50]

The Canadian case, *Montreal Tramways* v. *Leveille*,[51] is more important, first, because it is a decision of the Supreme Court of Canada; secondly, because it is more recent (1933). It was an appeal from Quebec and raised a question on the civil law prevailing in that Province. The action was brought under Article 1053 of the Quebec Code.[52] X, who was seven months pregnant, was injured by the negligence of the M. T.'s servant while she was descending from a tram. Two months later, her child, Jeannie, was born with club feet. In an action on Jeannie's behalf, the jury awarded $5.500. Judgment was affirmed by a majority of the K.B. (Appeal Side) and by four to one in the Supreme Court of Canada (Smith J. *diss.*).

In the Supreme Court, Lamont J. (with whom Rinfret and Crocket JJ. concurred), after reference to English and American authorities, said (at p. 340) that it must be admitted that the great weight of judicial opinion in the common law Courts denied a right of action for pre-natal injuries. He then turned to the civil law. Art. 345 of the Quebec Civil Code, which he regarded as practically embodying Roman law as set out in Digest, 1. 5. 7,[53] provides that ' The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.' The learned judge then cited various passages from French law and English law as showing that the civil law regarded a child *en ventre sa mère* as ' absolutely born, to all intents and purposes, for the child's benefit ' (at pp. 342—344); and he quoted English *dicta* (not confined to the civil law) from *Lancashire* v. *Lancashire* and *Clarke* v. *Clarke*, which I have already cited (*ante*, p. 84). Adding to these *R.* v. *Senior* (*ante*, p. 79), he held that this action, as it was for the

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[49] O'Brien C.J. expressly guarded himself against saying that in no circumstances could such a duty exist, and he seemed to think (at p. 77) that an action for assault might have been maintained by the child in *R.* v. *Senior* (1832) 1 Moody, C. C. 346 (*ante*, p. 79), if it had survived. Johnson J. denied any true analogy between criminal law and the law of tort.

[50] At p. 81.

[51] (1933) 4 D. L. R. 337.

[52] ' Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.'

[53] ' Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur.' The learned judge also cited Digest, 1. 5. 26;: ' Qui in utero sunt, in toto paene jure civili intellegentur in rerum natura esse.'

child's benefit, was maintainable; and that, though in some cases there is no analogy between crime and tort, yet in many cases they are different aspects of the same facts, and it was difficult to see why, if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it should not also recognize its separate existence for the purpose of redressing tort (at p. 344). 'If a right of action be denied to the child it will be compelled without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor' (at p. 345).

Lamont J. had to deal with the most troublesome part of the case in considering whether the evidence established a causal connection between the accident to the mother and the club feet of the child. Here there had been a direct conflict in the testimony of the medical witnesses called at the trial. Three of these, of whom the chief was Dr. Langevin, testified on behalf of the child that scientifically there was no explanation of the club feet other than the fall of her mother. Against these, six doctors supported the M. T.'s defence by stating that the cause of club feet is unknown. Lamont J. was of opinion that the law must decide on the balance of reasonable probabilities and that the correct inference from the evidence in this case was that the cause of the child's deformity was the fall of her mother.

Smith J., the dissenting judge, considered that the civil law rule as to unborn children referred to their property rights only. With all respect to the learned judge, his treatment of this side of the case is not convincing; but he was on much firmer ground in refusing to regard the evidence of causation as satisfactory. After a severe scrutiny of Dr. Langevin's evidence, he dismissed his theory as 'a mere guess' (at p. 366). I have studied his analysis of this evidence and I venture to concur in his opinion. May I add that every one of the English medical men (several of them leaders in the profession) whom I have consulted took the view that there is no certain explanation of the cause of club feet. Smith J. freely admitted that a jury, in a case like this, must frame its verdict on the balance of evidence. In that respect there was no difference between him and his brethren. But, with deference to the majority of the Supreme Court, the expert evidence on the child's behalf reads much more like pure conjecture than reasonable inference.

Next let us consider American law. A summary of its attitude is contained in a note signed 'C. A. W., jr.' in 13 Tulane Law Review (1939), 632—634. This note was provoked by a decision of the Illinois Appellate Court, *Smith* v. *Luckhardt* (1939).[54] The plaintiff, a minor, sued the defendant physicians for injuries sustained before birth. They had wrongfully diagnosed the pregnancy of the plaintiff's mother as

[54] 19 N. E. (2nd), 446.

a tumour of the *uterus*. They tried to destroy the supposed tumour by X-ray treatment. Consequently the plaintiff was born a cripple and feeble-minded. It was held that the defendants were not liable, for, unless a statute expressly allows such an action, a child, after it is born, may not sue for injuries inflicted before birth. The learned annotator then adverts to other American cases.[55] He says that, without exception, they deny any such right of action at common law,[56] and that the basis of these decisions is two different theories:—

(1) An unborn child has no existence apart from its mother.[57]

(2) Where the injury has been sustained in a public vehicle, the contractual relationship, if any, with the negligent controller of the vehicle is with the mother alone.[58]

The result of these two theories is, that a person owes no duty to an unborn child, apart from a duty not to injure the mother.[59]

There are, however, *dicta* (but no decisions) in some of the American jurisdictions which are to the contrary. They are based partly upon the analogy of the criminal law in cases of the type of *R.* v. *Senior*, which we have considered (*ante*, p. 79), partly upon the analogy of the unborn child's rights with respect to property (*ante*, p. 84).

The American Restatement of the Law of Torts also denies the child a right of action in tort for pre-natal injuries negligently committed to it, but in a *caveat* declines to express an opinion as to liability for harm inflicted on it intentionally or recklessly.[60] The Restatements are not binding on any Court, but they may be taken to represent the general trend of the most reputable decisions in the United States.

Of other foreign systems, the Japanese allows such an action.[61] In French law, the general rule is that human personality begins only at birth. Until then, the child has no life separate from that of its mother; it is, as the Romans said, *pars viscerum matris*. A qualification of this

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[55] The reports of many of them are unfortunately not accessible to me, owing principally to the dislocation caused by the war.

[56] *Dietrich* v. *Northampton* (1884) 138 Mass. 14; 52 Am. Rep. 242; *Allaire* v. *St. Luke's Hospital* (1904) 184 Ill. 359; 56 N. E. 638; 48 L. R. A. 225; 75 Am. St. Rep. 176; *Drobner* v. *Peters* (1921) 231 N. Y. 220; 133 N. E. 567; 20 A. L. R. 1503; *Newman* v. *City of Detroit* (1937) 281 Mich. 60; 274 N. W. 710. In *Montreal Tramways* v. *Leveille* (1933) 4 D. L. R. 337, 340 (*ante*, p. 85), Lamont J. said that the only case to the contrary cited to the Court was *Kine* v. *Zukerman*, 4 Pa. Dist. Rep. 227. As to cases denying the right of action, Lamont J. referred to several of those cited in 13 Tulane Law Review, 632—634, and added *Gorman* v. *Budlong* (1901) 49 Atl. Rep. 704; *Stanford* v. *St. Louis-San Francisco Ry. Co.* (1926) 108 So. Rep. 566.

[57] *Dietrich's case* (last note); but cf. *Lipps* v. *Milwaukee Electric Ry. Co.* (1916) 164 Wis. 272.

[58] *Nugent* v. *Brooklyn Heights R. R.* (1913) 154 App. Div. 667; 139 N. Y. S. 367. That was one of the reasons given in the Irish decision, *Walker* v. *G. N. Ry. of Ireland* (1891) 28 L. R. (Ireland), 69, which is considered *ante*, p. 84.

[59] *Drobner* v. *Peters*, *ante*, note [56]; *Magnolia Coca Cola Co.* v. *Jordan* (1935) 124 Tex. 347; 78 S. W. (2nd) 944; 97 A. L. R. 1513. The learned writer in 13 Tulane Law Review, 632—634, considers that the question is still an open one in Louisiana, the law of which follows the civil law and not the common law; so far there has been no litigation on this point.

[60] Vol. IV (1939), § 869.

[61] Civil Code, Art. 721.

is that an unborn child is capable of acquiring rights from the moment of its conception. The French Code limits these to rights of succession and rights to gifts and legacies.[62] This 'anticipatory personality' may also affect the acquisition of a new nationality, or the voluntary recognition of natural paternity or maternity, or rights of compensation where the father is injured by an accident in his work. But it applies only in the interest of the child.[63] In German law the general rule is the same as that in French law; an unborn child is not a person and is incapable of rights until birth is complete. This is modified by the general principle of the civil law, 'nasciturus pro jam nato habetur, quoties de commodis quaeritur'; but the *Bürgerliches Gesetzbuch* narrows this to the inheritance of property, the appointment of a guardian of the unborn child's future rights and the claim for 'alimentation' against a person who kills the father or other guardian of the child.[64] The result is that French law and German law refuse to allow a child a delictal remedy for injuries done to it before birth. On the other hand, Austrian law permits it,[65] and so does Swiss law.[66]

We may wind up these references to other systems of law by noting the attitude of Roman law. It recognized the unborn child only for what may be styled purely patrimonial rights, especially rights of succession. Even that much recognition came late into the system, except with respect to *postumi heredes*. It is improbable that the medical science of that age recognized injuries to a child in the womb, though there were penalties for procuring abortion.[67]

Conclusions.—I can now sum up my suggestions with respect to the English law of tort. They are only personal and tentative, for, as I have shown, no one knows what the law is.

I must consider separately three types of tort:—

(1) Injury to the person.
(2) Injury to property.
(3) Injury to reputation.

(1) *Injury to the person.*—Two things must be sharply distinguished here:—

(i) The advisability of allowing such an action at all.

(ii) The possibility of procuring adequate evidence of the causal connection between the pre-natal injury and the post-natal harm.

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[62] Art. 725, 906.

[63] Planiol, Droit Civil (1939), 1, §§ 366—367; Mazeaud, Responsabilité Civile (3rd ed., 1939), III, § 2409.

[64] Enneccerus, Kipp & Wolff, Lehrbuch des Bürgerlichen Rechts (1928), I, 1, § 77.

[65] In commenting on the Austrian BGB. § 22, Ehrenzwei gsays in *System des österreichischen allgemeinen Privatrechts*: 'Das gilt nicht nur fur das Erbrecht, sondern z.B. auch wenn ein Kind im Mutterleibe—etwa durch einen Eisenbahnunfall—verletzt wird. Wenn es verstümmelt, aber lebendig geboren wird, kann er Ersatzensprüche erheben.'

[66] 'Auch unerlaubte Handlung gegenüber dem nasciturus ist möglich': Egger, *Kommentar zum Schweizerischen zivilgesetzbuch* (1930), I, p. 292.

[67] See Digest, 50. 16. 231; 1. 5. 26; 34. 5. 7.; 5. 4. 3; 1. 9. 7; 26. 5. 20 pr.

As to (i), I can see no good reason why an action should not lie for pre-natal injury which results in post-natal harm. Nothing that I have read in the law reports or other legal literature, English or foreign, on the topic has produced any convincing arguments why it should not. The arguments which I venture to think unsound are the following.

(*a*) There is no English decision in which such a claim has been made. But if that were a valid objection, the common law would now be what it was in the Plantagenet period.

(*b*) An unborn child cannot contract. True, but what has that got to do with liability to it in tort? Here we have again the poisonous fallacy that, if A has broken a contract with B and the breach also injures C, C cannot sue A in tort *because* there is no contract between him and A. The House of Lords gave that fallacy its *coup de grâce* in *Donoghue* v. *Stevenson*[68] and the Judicial Committee of the Privy Council battened the earth upon its grave in *Grant* v. *Australian Knitting Mills, Ltd.*[69]

(*c*) Criminal law recognizes the unborn child, but one cannot argue from criminal liability to civil liability. I quite agree that often one cannot do so, but I would also urge that frequently the same facts constitute a crime and a tort and that each crime must be separately considered in order to decide whether it is, or ought to be, a tort as well. Now if A injures a child before birth so that it dies after birth, that may be homicide. Why, then, should it not be a tort on A's part? What difference is there in the child's grievance if it were killed by a blow administered before it was born or by one given after it was born, assuming in each case that it was born alive before it expired? In the second case an action would be maintainable on behalf of its estate under the Law Reform (Miscellaneous Provisions) Act, 1934.[70] Surely the same ought to apply to the first case. Apart from possible difficulties of evidence, which are discussed under (ii) below, the only distinction between the two cases is that death supervenes immediately in the second case and after a period of time in the first. And this distinction disappears completely if, in the second case, the child lingered for some months after the blow was given.

(*d*) The law of property recognizes the unborn child, but one cannot argue from that to recognition of it in the law of tort. To that I reply, first, that, where the tort is to property, the proposition seems to be unsound; secondly, that where the tort is not to property, the proposition, whether sound or unsound, has no force if one does not attempt to use the law of property as a parallel. And I think that the claim in tort can be supported without necessarily resting the whole weight of it on an analogy from property law. I have no intention of praying in aid that branch of the law in this connection except to urge that, where the tort is one to the person, the case for allowing a right of action is

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[68] [1932] A. C. 562.

[69] [1936] A. C. 85. The whole law on this is discussed in Winfield, Text-Book of Tort (1937), § 163.

[70] 24 & 25 Geo. V, c. 41.

a stronger one than for permitting a right of succession to property. It would seem odd if the law were to say to a child, 'You can acquire property before you are born, but you cannot acquire a right to compensation for personal injuries to you before birth." English law, like several other systems, concedes the general proposition that the unborn child is reckoned as a legal person where it is for his benefit that he should be thus regarded. To limit this proposition to property rights is to rate property higher in the scale of legal values than life and limb.

Setting aside any analogies from other parts of the law, the chief argument in favour of allowing a right of action for personal torts is the injustice of denying it. That was strongly put by Lamont J. in the passage already cited from *Montreal Tramways* v. *Leveille* (*ante*, p. 86), and I would respectfully agree with it.

(ii) As to the possibility of getting reliable evidence to support the claim, it seems to me to depend on the nature of the injury whether that requisite can be fulfilled. Where the injury is of the kind in *R.* v. *Senior* (*ante*, p. 79), there is no difficulty in criminal law and there would be none in the law of tort. In that case satisfactory evidence actually was produced to show that the crushing of the child's skull before birth was the cause of its death after birth. But where the injury occurred some time before *accouchement* took place, as in *Montreal Tramways* v. *Leveille*, the matter is doubtful. As I have indicated, such members of the medical profession as I have sounded on the question were of opinion that in general no one can positively and truthfully assert in such a case that there is a pathological connection between the prenatal injury and the post-natal affliction. Some of them qualified this by saying that there is no doubt that a child born prematurely as the result of an accident is likely to be more subject to infantile mortality and ailments than a child normally born. (Cf. *R.* v. *West*, *ante*, p. 79.) Such are the views of the doctors so far as I know them. But we know from *Leveille's case* that, at any rate in Quebec, there are some doctors who hold an opposite view. We know also that where experts give conflicting evidence, the jury, or the judge sitting without a jury, must decide which side is to be believed. If Courts were to wait until expert witnesses in any profession could agree, expert evidence would be largely useless. Hence, it is the weight of evidence that must guide the Courts. In the *Leveille case*, it is submitted, *pace* the majority of the Supreme Court, that it was against the plaintiff's claim and that on this point the dissenting judgment of Smith J. is preferable to that of the majority. For the rest, it is suggested that we must await each case as it arises in order to see what medical evidence it produces with regard to the particular type of injury committed, and that we cannot say offhand and in sweeping terms either that such evidence is always capable of establishing to the satisfaction of the Court the chain of causation or that it is never capable of proving it. There will be some cases where, in the present state of pathology, the evidence would be almost certainly

unanimous against the claim. It is said that James I of England was terrified at the sight of sword because his mother, while she was *enceinte* of him, had been frightened by the brandishing of a sword before her. Here it is unlikely that any doctor would swear to any probable connection between the two facts. Probably the same applies to the plot of Oliver Wendell Holmes' novel, *Elsie Venner*. There a girl's mother, while pregnant of her, had been scared by a snake and consequently the child inherited a snaky nature. On the other hand, there will be cases where the medical evidence will undoubtedly support the claim, as in *R.* v. *Senior* (*ante*, p. 79). Finally, there will be cases where the medical evidence is conflicting, and the Court must decide according to the balance of it.

(2) *Injury to property.*—Where it is possible for an unborn child to have a title to land or to goods, there seems to be no reason why, when it is born, it should not be able to sue in tort for any injury done to the land or goods during the pregnancy of its mother.

Of course, a baby cannot, until it is born, own its rattle or its garments, but land or goods might be held in trust for X for life and thereafter in trust absolutely for his eldest child. If X died while his only child were *en ventre sa mère*, it might well happen before the child is born that some tort is committed to the land or goods. In that event, an action ought to be maintainable, on birth of the child, for trespass or conversion or whatever the tort may be. A tort has been committed not only against the legal interest of the trustee, but also against the equitable interest of the child.

My difficulty is not so much in saying why the action ought to lie as in understanding why it should not lie. It is for the benefit of the child, and in Sir Orlando Bridgeman's time an injunction against waste to the land of such an infant was granted.[71] In an action for tortious injury to property, there would be no such problems about evidence like those which might arise in pre-natal injuries to the person.

(3) *Injury to reputation.*—It is submitted that here, too, an action ought to be maintainable. It would be for either slander or libel. An example would be an imputation of bastardy to the child while it is yet unborn. If it be objected that a person until he is born has no reputation, the answer is that reputation is what other people think of a person, not what he thinks of himself. It is objective, not subjective. An unborn child has, so far as I know, no mental powers. Therefore, defamation cannot directly affect it either physically or intellectually; but that is immaterial, as its reputation is something external to its body or its mind. As in (2), there would be no difficulty about proof of the tort.

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71 *Lutterel's case*, cited in *Hale* v. *Hale* (1692) Finch, Prec. in Ch., case 51; and in *Musgrave* v. *Parry* (1715) 2 Vern. 710. Even in modern times there are contradictory decisions on whether waste is or is not a tort: cf. Winfield, Text-Book of Tort (1937), p. 199.

THE DEPARTMENT OF CRIMINAL SCIENCE

J. W. Cecil Turner

IN the last issue of this Journal we announced the formation by the Faculty Board of Law of a committee to consider the promotion of research and teaching in criminal science. That the enterprise thus initiated was felt to satisfy a need was proved by the general welcome which was accorded to the committee both here and overseas, and the success which the committee's projects achieved was recognized by the University when it placed the study of this subject in Cambridge on a permanent footing by the establishment in December last of the Department of Criminal Science, by which the original Committee has now been replaced.

In this short note brief mention only can be made of the work on which the Department is engaged. This includes the composition of a survey and preparation of a catalogue of all the publications in the Blue Books relating to crime and the administration of criminal justice, since these official papers were first issued in the seventeenth century. This involves a comprehensive exploration of about 3,000 reports and papers, a task never previously attempted. It is expected that this research will make accessible information of the greatest importance not only for the guidance of those concerned in practice with the administration of justice and the shaping of penal legislation, but also for the future development of research in all branches of criminal science in this country.

The Department has also organized an examination into the relation to crime of such special conditions as mental deficiency, psycho-neurosis, insanity, sexual abnormality, and alcoholism, and has enlisted in this scheme the collaboration of fourteen British medical authorities.

This investigation has now reached an advanced stage, and it is intended in due course to publish the results in the series *English Studies in Criminal Science.*

The widespread appeal which is made by the scientific approach to the problems of crime is well shown by the relations which the Department has established overseas. Amongst these mention must be made of the generous interest which the Canadian Bar Association is taking in the work of the Department. That Association, in the best traditions of scientific collaboration, has accorded space in its journal, the Canadian Bar Review, for the publication of the shorter treatises issued under the auspices of the Department, and has arranged for their subsequent reproduction as pamphlets. The first of these, which has already appeared, discusses the question whether a conviction should be recorded against a delinquent who is put on probation; it comprises four short articles

each by a different author, following a general introduction by the editors of the Department's publications.

Other pamphlets are about to be issued and the Department wishes to take this opportunity of expressing to the Canadian Bar Association, and to Mr. Cecil A. Wright, K.C., the Editor of the Review, its sincere appreciation of their most valuable support.

It must finally be recorded that at a conference in Cambridge organized recently by the Department there was established the International Commission for Penal Reconstruction and Development. Representatives to serve on this Commission have been delegated from ten Allied Countries (Belgium, Czechoslovakia, Free France, Great Britain, Greece, Holland, Luxembourg, Norway, Poland, Yugoslavia), and there is provision for the accession of other countries. The constitution of the Commission provides for a close association with the Cambridge Department; thus, Professor Winfield, the Chairman of the Department, has also been elected Chairman of the Commission, and the author of this notice, who is Secretary of the Department, has also been elected Secretary of the Commission. The Commission has already selected several subjects for investigation and report by specially appointed committees. Amongst these may be mentioned the formulation of minimum rules for establishing the rights to be accorded to persons suspected or accused of crimes; rules of penal law for recidivists; and the preparation of a code of rules and procedure to be applied in dealing with those persons who have committed crimes in violation of the international laws of war.

It is now realized that a potent factor in the promotion and maintenance of good international relations is the existence of social security in each country; and this social security in large measure depends on the establishment of an adequate standard of criminal justice. The creation of the International Commission is a recognition that many problems of crime are common to all countries, and the association of the Commission with an ancient seat of learning manifests the importance of the scientific method in the solution of these problems.

All this activity is really the development of a movement inspired in Cambridge many years ago by the late Professor C. S. Kenny, who not only did much to reveal criminal law as a worthy subject for academic study, but also was one of the first to emphasize its relation to the other branches of criminal science. To the older generation of Cambridge lawyers, who retain warm memories of their association with Kenny, it is a matter of great satisfaction that the University, by the creation of the new Department, has now placed on a permanent footing the study of that science which he worked so hard to promote.

NOTES ON RECENT CASES

CONFLICT OF LAWS—MEANING OF 'NATIONAL LAW' IN THE PALESTINE SUCCESSION ORDINANCE, 1923, S. 4.

Jaber Elias Kotia v. *Katr Bint Jiryes Nahas.* [1941] A. C. 403.

THIS was an appeal to the Privy Council from a judgment of the Supreme Court of Palestine.

X, a Lebanese national, domiciled and resident in the Lebanon, had died there intestate and childless. The question was, in what proportions certain land belonging to the deceased, situated in Palestine, was to be divided between his widow and brothers, which turned on whether the division was to be made according to Palestinian or Lebanese Law.

Section 4 of the Palestine Succession Ordinance, 1923, provides, *inter alia*, that a civil Court shall distribute successions according to the following rules: . . . '(iii) Where the deceased was . . . . a foreigner . . . the following rules shall apply: (*a*) . . . . land . . . of the deceased shall be distributed in accordance with the national law of the deceased . . . (*c*) where the national law imports . . . the law of the situation of an immovable, the law so imported shall be applied . . .'' It was proved that in the case of land situated outside the Lebanon the Lebanese Court would apply the law of the *lex situs*, *i.e.*, in the present case, the law of Palestine. It was, therefore, held by the Supreme Court of Palestine and by the Privy Council that the distribution of the land was governed by the law of Palestine, the deceased being a person within the terms of section 4, clause 3, of the Ordinance.

The decision itself is clearly right, but the judgment, and in particular the following passage (at p. 413), has been severely criticized by a distinguished writer. 'In the English courts phrases which refer to the national law of a *propositus* are *prima facie* to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country . . . but to the law which the courts of that country would apply to the particular case of the *propositus*.' Presumably referring to that passage, the writer says (Canadian Bar Review, Nov. 1941, at p. 684): 'The *obiter dictum* as to what an English court would do is erroneous, because . . . (it) sometimes accepts the reference back and sometimes does not, after considering what particular theory of the *renvoi* prevails in the foreign law.'

It is submitted that the Court envisaged a problem of classification and that it was not concerned with and did not express any *obiter dictum* on *renvoi*. All it had and meant to decide was how to construe the words 'national law' in section 4 (iii) (a) of the Ordinance. To support its construction and to refute the argument that it would entail a *circulus inextricabilis*, it referred to English precedents. But it is submitted, with all respect, that the judgment attached too much weight to the view (which was merely *obiter*) that an English Court will *prima facie* construe the words 'national law' as meaning 'national law' according to English law.

R. A. S.

CONSTITUTIONAL LAW—EMERGENCY POWERS (DEFENCE) ACT, 1939—DEFENCE (GENERAL) REGULATIONS—REG. 18B—'IF THE SECRETARY OF STATE HAS REASONABLE CAUSE TO BELIEVE'—POWER TO DETAIN HELD TO BE AT COMPLETE DISCRETION OF SECRETARY OF STATE.

Liversidge v. *Anderson.* [1941] 3 All E. R. 338.

L was detained under the following Emergency Regulation, 18B:—

> 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.'

L, in an action against the Secretary of State for false imprisonment based his claim on the ground that the defendant ought to give him particulars of the grounds of his 'reasonable belief.' The House of Lords (Lord Atkin *diss.*) held L's claim to be bad.

One side adopted a subjective construction, 'If the Secretary of State *thinks* he has reasonable cause to believe'; the other interpreted the words objectively, 'If the Secretary of State has *in fact* reasonable cause to believe.' Had the second construction prevailed, the Secretary of State would have been obliged to submit for the approval of the judiciary the reasonableness of his grounds for believing etc. However, it was the former interpretation that gained the approval of the majority of the House of Lords.

Lord Atkin's view was as follows: The 'plain and simple meaning' of the words of 18B constituted the sole measuring rod. An exhaustive scrutiny of the meaning of 'reasonable' in the common law, in statutes generally and in the Regulations in particular, revealed, with the single exception of Reg. 42C (1), a sense consistently objective. As regards the question of expediency, the Courts should consider only the reasonableness of the Secretary's grounds. No objection to the revelation of those grounds seemed feasible. If his sources of information were confidential, the Secretary's affidavit would suffice. Finally, the subjective construction of his noble and learned friends was, in his Lordship's opinion, justified only by a *dictum* of Humpty Dumpty's in 'Alice Through the Looking Glass.'

The reasons for which Viscount Maugham and Lords Macmillan, Wright and Romer arrived at their conclusion might be expressed thus: the material words were undoubtedly ambiguous. In an emergency measure the general rule of interpretation of any ambiguity bade them give effect, within the limits of judicial construction, to the intention of the Legislature and of those responsible for the subsidiary Order in Council, namely, the preservation of the State at present engaged in total war.

Having examined the text of 18B, their Lordships were of opinion that an analysis, like Lord Atkin's, of 'reasonable,' 'satisfied,' etc., carried no weight in such a measure. The Secretary's function was purely executive. The Legislature had made no provision for judicial appeal which would be dangerous and even futile; indeed, they seemed to have impliedly excluded it by the machinery of an advisory committee (18B (4)), whose advice—a significant fact—the Secretary was at liberty to decline. Furthermore, 18B cases had to be reported monthly to Parliament and the detention was not punitive, merely preventive and strictly confined to the duration of the emergency.

The *ratio decidendi* of *Liversidge* v. *Anderson* appears to have been, "Salus populi suprema lex."

C. G.

CONSTITUTIONAL LAW—NEW ZEALAND LEGISLATION HELD TO BE CONCLUSIVE—INABILITY OF PRIVATE PERSON TO ENFORCE IN A LAW COURT RIGHTS CONFERRED SOLELY BY A TREATY OF CESSION AND NOT EMBODIED IN A STATUTE.

Hoani Te Heuheu Tukino v. *Aotea District Maori Land Board.* [1941] A. C. 308.

A, the respondent land board, a statutory agent to N. Z. native landowners, was, through its predecessor, under contract to T Company concerning certain rights on the lands. T Co., in 1914 and 1919, made agreements with E Co., whereby it obtained assistance from E Co. in order to fulfil its contract with A. In 1930, A cancelled its contract with T Co., owing to the default of T. Co. C Co., by statute, took the place of T Co. in relation to A, and, on that ground, claimed £46,000 from A. The N. Z. legislature intervened in 1935, and, in pursuance of an Act of that year, A paid E Co. £23,500 in settlement of its claim. The Act charged this amount on the native lands. The appellant, H, representing the landowners, contended that A had paid the sum in breach of A's duty to the landowners, and that the 1935 Act was *ultra vires* and contrary to the principles of the Treaty of Waitangi, 1840.

The Court held that, as in *Labrador Co.* v. *The Queen* [1893] A. C. 104, it could not go behind the legislature, that the Treaty of Cession was outside its jurisdiction, and that the 1935 Act was *intra vires* the legislature by an Imperial Act of 1812, which gave it the power to revoke section 73 of the N. Z. Constitution Act, 1852. H appealed to the Judicial Committee of the Privy Council.

H contended that the Treaty was part of the municipal law, confirmed by the 1852 Act (an Act of the Imperial Parliament), the Colonial Laws Validity Act, 1865, and the N. Z. Constitution (Amendment) Act, 1857, and that the 1935 Act had derogated from the Treaty rights. A claimed that the 1935 Act was *intra vires*, that the Treaty was not part of the municipal law, and that the Courts could not go behind the legislature.

The Lord Chancellor, on behalf of their Lordships, agreed with the Court of Appeal and quoted (at p. 323) *Labrador* v. *The Queen* [1893] A. C. 104: 'The courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination.' The Court rejected the claim of rights under the Treaty, which could become part of the municipal law only if there were statutory recognition of such rights. Finally, as the Imperial Parliament by an Act of 1857 had given the N. Z. Assembly powers to repeal the Act of 1852, even if the Treaty had been mentioned in statutes, the Assembly could alter and amend these statutes. Hence, the 1935 Act was valid in that the Imperial Parliament could have revoked the Treaty rights.

The Courts cannot go behind Acts of a Legislature, and there is no doubt that judicial control of legislation in the British Empire is now restricted. Where the Imperial Parliament confers certain powers on a Dominion Parliament, its enactments must be observed by the Courts and not considered *ultra vires* for any reason, as Lord Halsbury said in *Riel* v. *R.* (1885) 10 App. Cas. 675, 678.

K. L. H.

CONTRACT—PRINCIPAL AND AGENT—AGENT TO RECEIVE COMMISSION IF HE EFFECTS SALE—NO IMPLIED TERM THAT PRINCIPAL WILL NOT DISPOSE OF PROPERTY HIMSELF OR OTHERWISE ACT TO PREVENT AGENT EARNING COMMISSION.

Luxor (Eastbourne), Ltd. v. *Cooper.* [1941] A. C. 108.

C entered into a contract with two cinema companies, by which he was to receive a commission if he procured purchasers of their property. He procured ready and willing purchasers, prepared to buy on terms on which the companies were prepared

to sell. The companies, however, disposed of their property to another party. C claimed damages to the extent of the amount he would have earned had not the companies broken an alleged implied term ' to do nothing to prevent the satisfactory completion of the transaction so as to deprive the respondent of the agreed commission.' Branson J. held that as no sale had taken place, no commission could be recovered. The Court of Appeal reversed this decision, but the House of Lords restored it and held the defendants not liable. They considered the cases, *Trollope & Sons* v. *Martyn Bros.* [1934] 2 K. B. 436, and *Trollope & Sons* v. *Caplan* [1936] 2 K. B. 382, upon which C relied, and expressed the view that they were wrongly decided. The respondent had a purely contingent right to receive his commission out of the purchase-moneys if and when received. Lord Russell considered that even had the *Trollope* cases been rightly decided, the defendants would have had good reason for not proceeding with the sale, since their shareholders objected. The case of *Prickett* v. *Badger* (1856) 1 C. B. (N. S.) 296, was easily distinguished, since there the principal had had no title to the land to be sold, and had not revealed this to the agent.

As for the term alleged to be implied, it was held that a Court could only make such a presumption if the intention of the parties would otherwise be defeated. Lord Wright examined earlier cases which shewed how essential it was ' to examine the express terms of the contract, and how difficult . . . to imply in these cases a term restricting in the interests of an agent the freedom of a principal to deal with his own property or business according to his own judgment ' (p. 145). Lord Russell said: ' Implied terms can only be justified under compulsion of some necessity ' (p. 125).

N. A. P. M.

CRIMINAL LAW—EVIDENCE—CONFESSION—BUSINESS BOOKS AND DOCUMENTS PRODUCED IN CONSEQUENCE OF PROMISE, INDUCEMENT OR THREAT HELD TO BE INADMISSIBLE.

R. v. *Barker.* [1941] 2 K. B. 381.

THE appellant was convicted on an indictment charging him, together with another, of having conspired to defraud the Inland Revenue Authorities of sums due for income tax and sur-tax and of having delivered false statements of account with intent to defraud.

As the result of an interview, during which there was read to the appellant on behalf of the Inland Revenue Authorities an extract from Hansard containing certain assurances that, where full confession was made and evidence produced as to past frauds concerning income tax, no criminal proceedings would be instituted, the appellant produced ledgers which later were proved to have been fraudulently prepared.

Counsel for the prosecution contended that, although the appellant had produced the documents as a result of a promise or threat held out to him by the authorities and a confession induced under such circumstances was not evidence, the facts discovered in consequence could be proved against him. He also argued that, since the books and documents were in existence before the promise or threat was given or made and did not arise therefrom, they were not inadmissible. It was argued in reply that where discovery was made in the course of and not as the result of the confession, evidence of the discovery could not be given.

The appeal was allowed by the Court of Criminal Appeal, who declared that the present case differed from some others in that the promise or inducement implied in the extract from Hansard expressly related to the production of the documents,

and that this production was equivalent to an oral or written confession induced by promise or threat.

This decision puts documents produced as the result of a promise, inducement or threat by the prosecutor on the same footing as regards inadmissibility in evidence as an oral or written confession extorted under similar circumstances.

J. M.

CRIMINAL LAW—FELONIOUS HOMICIDE—PROVOCATION—CIRCUMSTANCES IN WHICH, ON TRIAL FOR MURDER, JURY SHOULD BE DIRECTED TO CONSIDER POSSIBILITY OF VERDICT OF MANSLAUGHTER—CHANCE MEDLEY AND PROVOCATION DISTINGUISHED.

Mancini v. *Director of Public Prosecutions.* [1941] 3 All E. R. 272.

ON a trial for murder, the evidence was that F and the accused were at emnity with one another. This ill-feeling culminated in a brawl in which the accused mortally wounded the deceased with a deadly weapon. The main case set up on behalf of the accused at the trial was self-defence. Verdict: murder. Appeal dismissed by the Court of Criminal Appeal and by the House of Lords.

On appeal, it was contended that the summing-up of the trial judge was inadequate. One ground for this assumption was that Macnaghten J. had not dealt sufficiently with 'provocation,' although he did point out that if the jury thought that the blow might have been struck without any premeditation, and in the excitement of the disturbance, they 'might' be justified in returning a verdict of manslaughter. The House of Lords thought that here Macnaghten J. was referring to 'chance-medley' as a defence to homicide rather than to 'provocation' as an ingredient in manslaughter. Objection was, moreover, raised to his use of the word 'might,' where 'should' would have conveyed the truer conception, but this the House considered to be an excessive refinement. On this subject of provocation, Viscount Simon L.C. remarked, that it is not all provocation which will reduce the crime of murder to manslaughter, but that it must be 'such as temporarily deprives the person provoked of the power of self-control.' Further, the test to be applied is that of the effect of the provocation upon a 'reasonable' man, as was laid down in *R.* v. *Lesbini* [1914] 3 K. B. 1116, so that an unusually excitable person can claim no extra protection.

It was also argued for the appellant that the language of Macnaghten J. was not in accord with the law laid down by the House of Lords in *Woolmington* v. *Director of Public Prosecutions* [1935] A. C. 462. This case is concerned with the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and consequently that, where the jury have a reasonable doubt about the matter, they should resolve that doubt in favour of the accused. But by this it was not intended to imply that in every charge of murder, whatever the circumstances, the judge ought to devote part of his summing-up to directing the jury on the question of manslaughter. The House also held that *R.* v. *Prince* [1941] 3 All E. R. 37, decided nothing more than that any reasonable doubt whether the facts shew that provocation reduces murder to manslaughter must be resolved in favour of an accused person.

J. A. S.

INTERNATIONAL LAW—DIPLOMATIC PRIVILEGE OF CLERK AT FOREIGN EMBASSY HELD TO BE CAPABLE OF WAIVER BY AMBASSADOR, AND TO HAVE NO EXTENSION FOR A REASONABLE PERIOD AFTER DISMISSAL OF CLERK.

R. v. *A. B.* [1941] 1 K. B. 454.

THE appellant, an employee at a foreign embassy, was convicted on charges under the Official Secrets Act and the Larceny Act. The ambassador had waived

diplomatic privilege. The Court of Criminal Appeal dismissed the appeal, holding that the immunity of a diplomatic servant was that of the ambassador and not of the individual, and could therefore be waived, if indeed such immunity existed on a criminal charge. Secondly, it was held that the extension of immunity for a reasonable time after cesser of office did not apply to cases of dismissal and waiver of privilege; and, thirdly, that the documents in question, although the property of the foreign embassy, were subject to the Official Secrets Act and the Larceny Act. The appellant, basing his case on the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), claimed that the waiver on the part of the ambassador, could not deprive him of his immunity. However, *Dickinson* v. *Del Solar* [1930] 1 K. B. 376, decided clearly that the immunity of a diplomatic agent is ultimately derived from the immunity of his sovereign, it being delegated by the latter to the ambassador and through him to his servants. Lord Hewart C.J. said in that case: 'Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and may be waived with the sanction of the Sovereign or of the official superior of the agent.'

Next, appellant claimed an extension of his immunity 'over a reasonable time,' adducing as basis for his claim *Musurus Bey* v. *Gadban* [1894] 2 Q. B. 352, and *Re Suarez* [1918] 1 Ch. 176. These cases established the principle of extended immunity only for the benefit of ambassadors whose mission has come to an end to enable them to wind up their official business. A case of dismissal is obviously outside any such extension.

Again, the appellant claimed that the jurisdiction of British Courts does not extend to protecting the foreign Sovereign against the acts of its subordinate. But on the basis of the decision in *Dickinson* v. *Del Solar*, liability to prosecution arises immediately on dismissal or waiver of privilege, and in spite of the fact that the act in question took place in a foreign embassy.

The case is noteworthy, because for the first time an English Court made a clear distinction between the rules regarding the termination of a diplomatic mission and waiver of privilege by an official superior of a diplomatic agent.

F. E. Z.

LANDLORD AND TENANT—LEASE—COVENANT RUNNING WITH THE LAND—PROVISO FOR PAYMENT OF £500 IF LEASE NOT RENEWED—ASSIGNEE OF REVERSION HELD NOT LIABLE.

Re Hunter's Lease, Giles v. *Hutchings.* [1942] 1 Ch. 124.

IN December, 1930, H demised premises to G for five years. There was a proviso that when the lease expired the lessor would pay the lessee £500. Non-payment entitled the lessee to remain in occupation for further terms of five years until it was paid. When any of these terms expired, the lessee could claim the money. In 1938, during the second term as agreed, H assigned the premises to X in fee simple, subject to the lease. In 1940 the plaintiff gave up possession and claimed £500 from X.

Uthwatt J. held that X was not liable. He said that the definition of a lessor in the proviso included '. . . the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant on the term hereby granted.' That was not conclusive. At common law the assignee of a reversion was not liable to the tenant for covenants and conditions contained in the lease. The Grantees of Reversions and Lessees Act, 1540, which gave tenants the same remedies against assignees of the reversion as they would have had against the grantor, the Conveyancing Act, 1881, s. 11, and the Law of Property Act, 1925,

s. 142, did not affect decisions that the criterion was whether the covenant touched and concerned the thing demised. The learned judge believed that the same principles applied in the case of covenants by landlords as in those made by tenants. He cited *Thomas* v. *Hayward* (1869) L. R. 4 Exch. 311. Channell B. said that, 'a covenant runs with the land only when . . . its operation directly, and not merely collaterally, affects the thing demised.' Counsel for the plaintiff did not claim, against the Irish decision *Inchiquin (Earl)* v. *Burnell* (1795) 3 Ridg. Parl. 376, 420, 422, 424, and *Hill* v. *Booth* [1930] 1 K. B. 381, that a mere covenant by the landlord to pay £500 when the lease expired ran with the lease. Counsel had argued that as the tenant had a lease whose renewability the landlord could stop only by payment of £500, the covenant touched and concerned the land like any other covenant for renewal. The Court of Appeal, in *Woodall* v. *Clifton* [1905] 2 Ch. 257, however, held that: (1) an option to purchase given to a tenant does not run with the lease; (2) the rule referring to a covenant for renewal is an anomaly.

Uthwatt J. therefore held that as neither party could force a renewed tenancy on the other, it would be an unjustifiable extension of an existing anomaly to decide for the plaintiff.

J. S.

TORT—ANIMALS—NEGLIGENCE—ESCAPE OF STEER ON TO HIGHWAY FROM PEN PROVIDED BY LOCAL AUTHORITY AT CATTLE MARKET—NO LIABILITY OF LOCAL AUTHORITY AS MARKET OWNER FOR INJURY TO PERSON BY STEER.

Brackenborough v. *Spalding U. D. C.* [1942] 1 All E. R. 34.

P sent steers to Spalding Market for grading under the Cattle Subsidy Scheme, 1937. The scheme provided that where animals were to be examined there must be adequate penning accommodation. P's servant, on the direction of the defendant's official, put them into a pen for the purpose. Three sides of it were permanently enclosed, but across the front was a detachable loose chain only. Awaiting gradation, a steer from the pen escaped under the chain, knocking down and killing B.

The House of Lords held the Council not liable as owners of the market to B's widow. Their only duty was to provide requisite space and permit those desiring to attend to bring such things as were commonly sold there. They did not undertake the care of animals sent there, nor were they under any duty to keep them in. Lord Wright mentioned the three grounds of liability for animals, *i.e.*, cattle trespass, dangerous disposition of the animal, and negligence. There was no cattle trespass and the animal was *mansuetae naturae*. There was no duty to prevent escape, and the pens were introduced as a voluntary measure for the convenient conduct and management of the market. Lord Porter said that persons going to a market must take the ordinary risk of escaping beasts. He cited Blackburn J. in *Rylands* v. *Fletcher*: 'Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near to it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so, subject to their taking upon themselves the risk of injury from that inevitable danger.' (L. R. 1 Ex. at p. 286.)

The decision of C. A. was affirmed, but there it was held that the drovers had, at all times remained in control of the animals and that the local authority had at no time assumed control. The H. L. decision limits liability of a market-owner in the circumstances of this case. Comment was made by Lord Wright (at p. 41) that no reliance had been placed by the appellant on the rule in *Heath's Garage, Ltd.* v. *Hodges* [1916] 2 K. B. 370, that there is no duty on an owner or occupier of land adjoining the highway to prevent animals upon it from escaping on to the highway.

J. McP. A.

TORT—CONSPIRACY—COMBINATION WITH THE PREDOMINANT PURPOSE OF PROTECTING THE LEGITIMATE INTERESTS OF THE COMBINERS—HELD, NOT A TORTIOUS CONSPIRACY.

Crofter Hand Woven Harris Tweed Co., Ltd. v. *Veitch.* [1942] 1 All E. R. 142.

MUCH of the yarn used in the manufacture of Harris Tweed on the Isle of Lewis was spun in the island mills; the majority of the spinners were members of the Transport and General Workers' Union. The plaintiff company, C, however, obtained their yarn at a lower cost from mills on the mainland. The defendant V was the Scottish Area Secretary, and the defendant M was the local Branch Secretary, of the Union. They wished to establish a better basis for collective bargaining by preventing undercutting and unregulated competition in the island's industry. Accordingly, V directed M to instruct the island dockers, who were members of the same Union, not to handle C's goods which were consigned from, or destined for, the mainland. M agreed to communicate these instructions, and the dockers, without breaking any contract, complied. C, who suffered damage, unsuccessfully sought an interdict on the grounds of, *inter alia*, unlawful conspiracy ([1940] S. C. 141). C appealed to the House of Lords. There was no material difference between the English and Scottish law relating to the issues raised on appeal. Nor was any provision of the Trades Disputes Act, 1906, applicable.

The House of Lords unanimously dismissed the appeal. The speech of Lord Simon L.C. included an important analysis and restatement of the law of tortious conspiracy. There was, he held, a combination between the defendants, for although M was the inferior official, he had willingly agreed to execute V's instructions. The conduct of the defendants had caused damage to C's trade. It was therefore necessary to determine the purpose of the combination. 'Purpose' was a safer test than 'intention' or 'motive'; it avoided ambiguity. If the combinations causing the damage had more than one purpose, liability in tort for conspiracy depended upon the nature of the predominant purpose; and 'unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination lawfully to damage a man in his trade is unlawful' (p. 150). Here the predominant purpose of the defendants in injuring the plaintiff's trade was to improve the wage-prospects of the members of their Union. They had used no unlawful means in effecting their purpose. They were, therefore, not liable.

Lord Simon added (*loc. cit.*): 'Although most of the cases have dealt with trade rivalry in some form or other, I do not see why the proposition as to the conditions under which conspiracy becomes a tort should be limited to trade competition.' In no speech, however, was any attempt made to define the exact scope of the tort.

Lord Maugham thought there might be a tortious conspiracy even where no unlawful means were used and injury to the plaintiff was not the predominant purpose of the combiners; but the examples he suggested (at pp. 151-2) appear to be merely cases where, in his Lordship's view, the combiners would not be acting in defence of a 'lawful interest.' Lord Porter, however, was clearly uncertain which of the tests should be applied (pp. 172—173).

Lord Wright and Lord Maugham held that a combination was constituted when the parties had substantially the same object; it was unnecessary for the advantages they hoped to derive to be completely identical.

Lords Simon (at p. 147), Thankerton (at p. 156) and Wright (at p. 163) held that it was for the party injured to prove that the purpose of the combination was unlawful. This was the view taken by Lord Buckmaster in *Sorrell* v. *Smith* [1925] A. C. 700, 748.

Conspiracy has thus been clearly established as an independent tort. Its exact scope remains uncertain, but there seems no reason why it should be confined within its already undisputed province. But it would appear that the philosophies of individual judges must inevitably produce divergent interpretations of what are those 'lawful interests,' in the protection of which combinations of persons may inflict wilful damage by lawful means upon others.

S. A. DE S.

TORT—DANGEROUS STRUCTURE—LIABILITY OF LANDLORD OF PREMISES TO INVITEE OR LICENSEE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.

Haseldine v. *Daw & Son, Ltd.* [1941] 2 K. B. 343.

THE landlord of a block of flats retained control of the lift. He employed a firm of engineers to repair the lift. An employee of the engineers negligently failed to adjust a gland with the result that the lift collapsed while carrying the plaintiff, who was visiting a tenant. The plaintiff sued the landlord and the engineers for negligence. The Court of Appeal (1) unanimously held the landlord not liable; (2) by a majority (Clauson L.J. *diss.*) held the engineers liable.

As to the landlord, Scott L.J. thought that, with respect to him, the plaintiff was an invitee, for the landlord had an interest in facilitating access to his flats not only of his tenants, but also of their visitors. His Lordship rejected mutuality of interest as a criterion, and he declined to follow certain views expressed in *Fairman* v. *Perpetual Investment Building Society* [1923] A. C. 74, regarding them *obiter dicta*. Goddard L.J., though personally inclined to regard plaintiff an invitee, felt himself bound by *Fairman's case* to hold him to be a licensee. As to whether the duty towards an invitee is (1) to make the premises reasonably safe, or (2) to ascertain existing dangers and give reasonable warning, both Scott and Goddard L.JJ. thought the duty was to make the premises reasonably safe, and that an occupier is not liable for the defaults of independent contractors. This inclines to view (2). Hilbery J. had rested his decision in the Court below on the landlord's negligence as a carrier, holding that there was no difference between horizontal and vertical carriage. The C. A. did not dissent from this, but held that Hilbery J. had wrongly applied the principle, for any one travelling gratuitously in a vehicle must take it as he finds it.

As to the engineers, Scott L.J. applied the principle of *Donoghue* v. *Stevenson* [1932] A. C. 562, regarding manufacturers; the principle had already been extended to repairers. Goddard L.J. pointed out that the engineers had excluded a reasonable probability of intermediate examination. Clauson L.J., however, declined to hold them liable as, in his opinion, no duty of care had been proved.

It should be noted that Luxmoore L.J., in *Wilkinson* v. *Rea* [1941] 1 K. B. 688, had held an occupier liable for the defaults of an independent contractor. It would seem more satisfactory if the law adopts 'reasonable care' as the test in every case, making 'reasonable' a question of degree, instead of classifying persons as 'invitees' and so forth. This case, it is respectfully submitted, has left confusion worse confounded, at any rate as regards the interpretation of *Fairman's case*.

R. W. M. D.

TORT—DEFAMATION—LIBEL—STATUTORY DUTY—QUALIFIED PRIVILEGE ARISING FROM COMMON INTEREST—REPORT OF COMMITTEE TO BOROUGH COUNCIL, PUBLISHED BY COUNCIL IN PUBLIC LIBRARIES, HELD NOT TO BE PRIVILEGED.

De Buse v. *McCarty and Stepney Borough Council.* [1942] 1 K. B. 156.

THE three appellants were employees of the Stepney Borough Council, and had been accused of complicity in thefts of petrol from its cleansing department. The Council set up a committee of enquiry, whose report to the council contained statements assumed by the Court of Appeal to be defamatory of the appellants. The report was posted by the respondents, with the agenda for the next Council meeting, on the door of the Town Hall, and copies were sent to the Public Libraries.

Held, by the Court of Appeal, there was no defence to publication of the libel.

The respondents first relied upon the Metropolis Management Amendment Act, 1856, s. 9, which imposes a duty on the Council to fix on the door of its meeting place notice of its forthcoming meeting, and the special purposes thereof; which, it was alleged, meant all the documentary particulars. The Court disagreed with this interpretation, though Goddard L.J. suggested that, in certain cases, posting the agenda would necessarily involve the publication of libels. If this were so, it would be no more than an interesting application of the defence of statutory duty to libel.

The respondents turned to a defence of qualified privilege on the ground of a common interest with the ratepayers. The appellants seem to have admitted the common interest, but argued that this did not justify publication to the non-ratepayers as well. Lord Greene M.R., however, preferred to hold that there was no case of privilege at all. He cited a passage of Lord Atkinson in *Adam* v. *Ward* [1917] A. C. at p. 334, to the effect that qualified privilege exists only when the person who makes the communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and that person has a corresponding interest or duty to receive it. In the present case, neither had the Council any interest in communicating a matter which was still *sub judice*, nor had the ratepayers any interest in receiving something relating only to the internal working of the administrative machinery.

It is fortunate that Lord Greene chose to deal with the case in this way, and not to admit the common interest and base his decision on unnecessarily wide publication. Common interest is, by Lord Atkinson's definition, a very elastic defence, for to determine exactly what is a "legal, social, or moral interest' must often be a difficult question. This is a new illustration of its limits, and should prove a useful guide.

J. S.

TORT—FALSE IMPRISONMENT—ARREST WITHOUT WARRANT OF AN 'OFFENDER' ON CHARGE OF HARBOURING UNCUSTOMED GOODS WITH INTENT TO DEFRAUD—STATUTORY AUTHORITY UNDER CUSTOMS CONSOLIDATION ACT, 1876, HELD TO INCLUDE A PERSON REASONABLY SUSPECTED OF HAVING COMMITTED THE OFFENCE.

Barnard and Another v. *Gorman.* [1941] A. C. 378.

A and B were preventive Customs officers who detained C, a ship's steward, and charged him before the police court with knowingly harbouring uncustomed goods with intent to evade the payment of duty thereon, contrary to the Customs Consolidation Act, 1876, s. 186. After some hours in custody, he was released on bail. The charge was dismissed. He sued A and B for false imprisonment. A majority

of the Court of Appeal gave judgment for him. The House of Lords reversed the Court of Appeal. They decided the case purely on the construction of the section, whence two salient questions arose. Did it authorise the detention of persons reasonably believed to have offended against it, or merely such persons as subsequent legal proceedings should prove actually to have done so ? Secondly, had the Customs officers reasonable ground for their belief in this case ? The affirmative answer to the second question gave no difficulty. As for the first, section 186 comprises a list of nine methods of offending against it, a penalty clause, ' and the offender may either be detained or proceeded against by summons.' The House of Lords held that ' offender ' in this context meant ' suspected offender,' for the summons only accuses and guilt remains to be ascertained: ' it would be unreasonable to enact that a man may be proceeded against by summons only if he is actually guilty ' (Lord Wright, at p. 391). Though a word might vary in meaning from Act to Act, and even within the same Act, ' offender ' in this context must mean the same with reference to ' detained ' as to ' proceeded against by summons.'

Earlier cases of the same type, *Trebeck* v. *Croudace* [1918] 1 K. B. 158; *Isaacs* v. *Keech* [1925] 2 K. B. 354, and *Ledwith* v. *Roberts* [1937] 1 K. B. 232, were briefly discussed, but were considered not directly relevant.

The matter was important, balancing liberty of the subject against efficient working of the Customs, and the conclusion seems workable.

The grounds of the decision are not absolutely convincing, but the alternative interpretation of the statute would make it (as Lord Wright said, at p. 391) ' unreasonable.'

R. N. H.

TORT—FALSE IMPRISONMENT—ARREST WITHOUT A WARRANT, BUT ON REASONABLE SUSPICION, OF A PERSON WRONGLY BELIEVED TO BE AN OFFENDER UNDER THE FUGITIVE OFFENDERS ACT, 1881—HELD, TO BE FALSE IMPRISONMENT.

Diamond v. *Minter*. [1941] 1 K. B. 656.

D, the plaintiff, a citizen of New South Wales, came to England. In London he was arrested by two Metropolitan Police officers, who honestly believed him to be one, F, who was a fugitive offender and was said to be wanted by the New South Wales police for forgery and conspiracy to defraud. At the police station M, a third police officer, detained D and charged him as a fugitive offender, on a warrant issued by the Chief Magistrate at Bow Street for the arrest of F under the Fugitive Offenders Act, 1881, with conspiracy to defraud in New South Wales. In the afternoon D was remanded in custody for six days, but three days later D was able to prove his identity and was released.

D sued the three police officers for false imprisonment. The defendants pleaded that as constables they had reasonable and probable cause for suspecting that there had been committed out of this country that which if committed in this country would have been a felony, and that they had reasonable and probable cause for suspecting that the plaintiff was the person who had committed it.

In holding the defendants liable, Cassels J. said that a police officer is not justified in arresting a person on such grounds without a warrant. The defendants' contention was based upon the following dictum of Brett L.J. in *Reg.* v. *Weil* (1882) 9 Q. B. D. 701, 706: ' I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country.' Cassels, J. disagreed with this dictum. The High Court of Australia, in the case of *Brown* v. *Lizars* (1905) 2 C. L. R. 837, where this point was discussed, held that a constable had no such right. Cassels J. also referred to Sir Francis Piggott,'s *Extradition*, 91,

where it is said with reference to the dictum of Brett L.J., 'This seems to set at naught the fundamental principles on which extradition rests, because it denies the common law right to be at liberty if no offence against the law of England has been committed. The Extradition Act provides the only way in which that right may be broken in upon.'

The apprehension, to-day, of fugitive offenders within the British Empire depends on the Fugitive Offenders Act, 1881, which, by section 2, provides that a fugitive offender found in any part of His Majesty's dominions may be apprehended under an endorsed or provisional warrant and returned in the manner provided by the Act. If under a warrant for the arrest of one person a constable, by mistake, arrests another person, he is afforded no protection by the warrant against an action for false imprisonment, even though he had reasonable ground for suspecting that the person arrested was the one to whom the warrant related.

R. C.

TORT—NEGLIGENCE—INDEPENDENT CONTRACTOR—INSPECTION AND APPROVAL OF WORK BY EMPLOYERS HELD TO NEGATIVE LIABILITY OF CONTRACTOR.

Buckner v. *Ashby & Horner, Ltd.* [1941] 1 K. B. 321.

A & Co., the defendants, contracted with the London Corporation to roof in a passage-way. The Corporation did not supervise the work, but required that on completion it should be inspected and passed by their inspector. The defendants left the sole-plate of a pillar in a dangerous position on the floor of the passage, which was dark by day, and at night was lit by a dimmed electric bulb, which illuminated the entrance to the premises of X, but did not illuminate the passage floor.

The plaintiff, B, an employee of X, tripped over the sole-plate and was injured in consequence.

Atkinson J. held that A & Co. were not liable. He found that (1) the sole-plate was unnecessarily dangerous, considering the inadequate conditions of lighting, and (2) B was not guilty of contributory negligence. Applying *Donoghue* v. *Stevenson* [1932] A. C. 562, he held that as the inspection of the work by the Corporation had taken place, there was 'an intervening conscious agency which might and should have averted the mischief' (at p. 335), and A & Co. owed no duty to B. He also held that the effective cause of the injury was the inadequate lighting of the passage; for this A & Co. were not responsible, as they were entitled to assume that the Corporation were in control of the lighting. The relevant principle here was that expressed by Lawrence J. in *Brown* v. *Cotterill* (1934) 51 T. L. R. 21: 'Are the terms of the contract such that an ordinarily prudent person would consider that his liability was at an end after the approval of the other party to the contract?'

The Court of Appeal affirmed this decision on the facts, du Parcq L.J. (at p. 338) emphasizing that a new principle of law was not being laid down. Goddard L.J. was careful to point out that the intermediate inspection by the employers would not invariably remove the duty owed by the contractors to B. Had their work created something in the nature of a trap not apparent to those who inspected and approved the work, such inspection and approval would not have broken the nexus of liability.

The decision adds a little more to the appreciation of the significance of *Donoghue's case*, and would appear finally to discredit *Earl* v. *Lubbock* [1905] 1 K. B. 253, though the misconceptions created by that case might disappear, were it pleaded differently, at the present day.

J. D. G.

TORT — NUISANCE — HIGHWAY — LIGHTING RESTRICTIONS — NO DUTY TO LIGHT OBSTACLES ERECTED LEGALLY UNDER STATUTORY POWERS.

Lyus v. *Stepney Borough Council.* [1941] 1 K. B. 134.

IN 1936, the defendants, under statutory powers, erected a sandbin on the highway. The Lighting (Restrictions) Order, 1939, prohibited the lighting of streets. In the dark the plaintiff, L, collided with the sandbin and sustained serious injuries. He claimed damages for personal injuries due to the negligence of the defendants and to their breach of statutory duty. The Court of Appeal held that defendants were not liable.

The sandbin did not at the time hinder a reasonable user of the street, and consequently it could not be held to be a nuisance: *Greenwood* v. *Central Service Co.* [1940] 2 K. B. 447, and *Wodehouse* v. *Levy* [1940] 2 K. B. 561. Under the statute two distinct powers were granted: (1) to provide, (2) to maintain, the obstacle. Lord Parker, in *Great Central Ry.* v. *Hewlett* [1916] 2 A. C. 511, described the power to maintain as 'Negatively, it relieves the company from any obligaton which might otherwise have existed to remove the post. Positively, it enables the company to do what is necessary to keep the posts there.' On the other hand, in *Morrison* v. *Sheffield Corporation* [1917] 2 K. B. 866, the obstruction had not been erected under statutory authority, and the defendants were held liable. In the present case the sandbin was erected under the statute, and the local authority incurred no liability.

Under 'black-out' conditions it seems that the Legislature ought to impose a duty on local authorities to mark these obstructions in view of public safety.

D. R. F. M.

BOOK REVIEWS

Criminal Law and its Administration : Cases, Statutes, and Commentaries. By JEROME MICHAEL, Professor of Law, Columbia University, and HERBERT WECHSLER, Associate Professor of Law, Columbia University. Chicago: The Foundation Press, Inc. 1940. xi and 1410 pp. ($6.50.)

Years of interpretation in the American Courts and the great mass of legislation in the different States of the Union have at the present day produced a body of criminal law in the U.S.A., which, based though it is on the Common Law of England, has many points of difference from our own system. In dealing, therefore, with this most important contribution to the study of criminal law and its administration in their own country, which Professor Michael and Professor Wechsler have made, it is not for an English lawyer to endeavour to appraise its merits as an exposition of American law. On the other hand, the present reviewer is not qualified to venture on any estimate of its value as a text-book for the law students of American universities, where the curriculum and the time alloted for its pursuit, are different from the far from perfect system which tradition has established here. But of its value to students of criminal science in this country there can be no question. I use the expression criminal science deliberately, because this volume devotes much more space to considerations of criminal biology, criminal sociology and criminal policy than to a discussion or exposition of the principles of substantive criminal law of procedure.

The authors have addressed themselves not so much to the rules of criminal law as to the personal and social causes of crime and the steps to be taken to combat crime. Their words are: ' We are concerned with the inherent and fundamental problems of the criminal law, viewed as a device for the government of men—both those presented to judges and administrators functioning within the framework of existing systems and those confronting legislators empowered to make sweeping changes and create new systems.' Again, ' Our enterprise calls for a method which emphasizes general normative ideas rather than specific legal rules.' The whole volume is accordingly divided into four parts, with an appendix. Part I consists of an introduction of twenty-five pages. Part II, entitled ' The Prevention of Socially Undesirable Behavior,' forms the largest portion, covering over 660 pages, about one-half of the whole work. It is divided into two main sections, the first dealing with ' Behavior which produces socially undesirable results ' in which are discussed the principal substantive crimes, and the second dealing with ' Behavior likely to produce socially undesirable results ' which covers the inchoate crimes of Attempts, Solicitation, and Conspiracy. The title of Part III is ' The Problem of Criminal Responsibility.' The authors subdivide this portion into (i) vicarious responsibility (accomplices and corporations), (ii) the actor's knowledge (mistake and *mens rea*), (iii) the actor's intellectual and volitional capacity (mental defects, intoxication, immaturity). This Part takes up nearly 300 pages. The final Part (IV) contains 270 pages devoted to ' The Problems of Conflicting Values.' Here the authors approach the conflict between the needs of social security and the liberty of the individual, reviewed under the headings ' Social protection against dangerous persons ' (recidivists, vagrants, the feeble-minded and psychopathic) on the one hand, and ' Criminal law and civil liberties ' on the other. The Appendix gives a survey of American statutes relating to homicide, and selections from the codes of Cyprus, India, Italy and the U.S.S.R.

In order to give effect to their main purpose, the authors have devoted a relatively large space to a discussion of homicide, the only other specific crime

which they examine fully being theft, their view being that this material is most suitable to emphasize 'the substantive problems involved in protecting persons and property by means of the criminal law.'

Clearly a book which ranges over such a wide field cannot be adequately reviewed in the space which war-time exigencies allow. It contains a wealth of references to and extracts from the reports of cases decided not only in American but also in Canada and Great Britain, together with most useful quotations from legal literature of all kinds. There can be no hesitation in saying that this book should be made available to every student of criminal science in whatever branch of that vast subject he may be working. It is a storehouse of information, most admirably documented and indexed, and in every way a credit to its authors and publishers.

J. W. C. T.

Law without Force: The Function of Politics in International Law. By Gerhart Niemeyer. Humphrey Milford, Princeton University Press, Princeton. 1941. xiv and 408 pp. (22*s.* 6*d.*)

This is an excellent though controversial book, a short review of which can hardly render it full justice. Starting from the proposition that political reality has become unlawful because International law has become unreal, the author proceeds to analyze the basis of law, both municipal and international, at the present time and at earlier periods, with a view to establishing the fundamental principles of a system of International law adequate to the present century. The author regrets at the outset the view so frequently expressed to-day, that the absence of effective force, or a deterioration in the moral standards of mankind, are responsible for the present decline of International law. In his historical analysis he shows that development has been from the recognition of a divine law embracing the entire Christian world through a system serving the dynastic needs of princes, to a system of laws serving the specific interests of individuals in a world of liberalism, chiefly by restricting the power of States to interfere with economic expansion. A legal analysis leads the author to the conclusion that, with the advent of rationalist and positivist tendencies, law was regarded as an abstract command relying solely on force for its observance. It became detached from its moral background which was relegated to the position of an 'ideal law,' representing, at best, a system of ethics addressed to the individual. The author observes that this quest for 'reality' has resulted in the disregard of the forceful reality of ideas and ideals and has led to an excessive belief in the values of physical force as an attribute of law. In the chapter devoted to a sociological analysis of municipal and of International law, the author expresses the opinion that evolution during the last twenty years has been from liberalism to autarchy and from nationalism to statism, with the result that the present system of International law as developed in the nineteenth century on the basis of economic and political liberalism with a view to restricting the power of States to interfere with the interests of the individuals constituting the community of nations has become obsolete. The author advocates a functional approach to law. He suggests that a system of International law capable of governing the present structure of society must be conceived, not in terms of the independence of the individual and of the State which protects him, but in terms of the interdependence of States, seeing that all law should be viewed not as a system of abstract commands, but as an organisation for given tasks. As far as such tasks exceed the operational sphere of the State, the central organising power, and require the collaboration of the other centres of organisation, this organisation for common tasks is constituted by International law. International law is thus 'a principle of orderliness,' 'inherent in the actual behaviour of individuals,' 'the imminent standards of which are contained in the co-ordinate structure of social action.' These standards can

be found 'by a scrutiny of the way in which such co-ordinatedness is actually realized by concrete individuals in a given historical situation.' The author is aware of the fact that the problem how to ascertain these imminent standards is difficult, seeing that they are not to be found by the method of modern 'realism,' but in 'individual evaluations which, with respect to social relationships, obey a certain transpersonal necessity.' The author sets out to show that law is imminent in social relations directed towards achieving certain tasks and not introduced from without by means of physical force, that it is based upon generally accepted axioms prevailing in the community, and that law, functionally conceived, contains its own inherent values, thus overcoming the former cleavage between positive and ideal law. It may be asked whether this is not natural law reappearing in a new guise as a system of functionally conceived law. It may be questioned also whether a system so conceived fulfils the requirements of clarity, stability and security. The author promises to treat special problems in another place. In the present work he discusses critically the proposals to form a World State, Federalism and other regional organisations. The author's opinion in respect of these questions, and, generally, in respect of the future of International law, may be summed up in his own words: 'not organisation, but orientation.' The book repays a detailed study.

K. L.

Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration. By R. G. McElroy. Edited by Glanville Williams. Cambridge: The University Press. 1941. xl and 255 pp. (15*s.* net.)

The learned author and editor of this penetrating analysis have attempted adventurously to resolve many of the difficulties which make Impossibility of Performance so confused and daunting a subject, and it is their contention that much can still be done by simplification and restatement. The process of 'unscrambling the eggs,' as the editor puts it, necessarily involves so provocative an onslaught upon much that has been said by judges and text-book writers that a short review cannot do justice either to their arguments or, conceivably, to comments upon those arguments.

The most striking parts of the book are, perhaps, those which advocate the segregation of cases which, it is contended, properly involve failure of consideration and the limitation of the term 'frustration' to the remaining cases of inordinate delay. It goes without saying that, having a strictly realist viewpoint, both learned writers shudder at anything which savours of fictitious implication, and therefore seek to apply their pruning knife to the outgrowths of *Taylor* v. *Caldwell*, and in particular to much that *Krell* v. *Henry* and what is called 'the *Tamplin* fallacy' have helped to engraft upon that potent stock. They are equally formidable when dealing with those more incidental points which are material to their conclusions, such, for example, as the occasionally inept use which has been made of *The Moorcock*. The editor has rounded off the work by including a number of suggested propositions with regard to the event upon which one party relies as discharging him from his contract.

It is interesting to note how often the views expressed in the American *Restatement of the Law of Contract* correspond with those of the authors, though much of the draft was written before its appearance. They do not claim that all their contentions are established in the sense that a practitioner 'his art made tongue-tied by authority,' could use them in a Court of law, for there is sometimes too much in the way. The task of assailing a number of propositions accepted by the highest Courts is pursued

with courteous determination; 'unfortunately' is a word constantly applied with sadness and discretion to numbers of suggested judicial deviations from the strait and narrow path. But some of the more recent cases show how difficult has been their task. Dr. McElroy criticizes Lord Sumner's views on the important subject of whether discharge for undue delay is 'automatic.' These views were expressed in the Privy Council in *Hirji Mulji* v. *Cheong Yue* [1926] A. C. 497, and (as the editor points out) they were expressly approved in the House of Lords in *Constantine S.S. Line* v. *Imperial Smelting Corporation* [1941] 2 All E. R. 165, by Lord Maugham and Lord Wright, and were also adopted by Lord Simon. The latter case also shows that no members of the House of Lords flinched from recognizing the wide use of the word 'frustration' so condemned by this work (see in particular Lord Wright at pp. 184, 185). It may be noted, too, that the authors are at variance with the same eminent authority in *Luxor (Eastbourne), Ltd.* v. *Cooper* [1941] A. C. 108, upon whether the implication that a contract is to be dissolved if there is a vital change of conditions is exceptional or not.

It may be that one day the whole of this subject will be enquired into by a Law Revision Committee, and, if so, the authors' voices here uplifted, may bear a resemblance to that '. . . melting voice through mazes running,' for certainly this is a gallant attempt at 'untwisting all the chains that tie the hidden soul of harmony.'

R. P. F. R.

The British Constitution. By W. Ivor Jennings, M.A., LL.D.; Principal of Ceylon University College. Cambridge University Press. 1941. xv and 232 pp. (8*s*. 6*d*.)

This is a most important book, and it deserves to reach a wide public. For the general reader, in England or abroad, it is a well-informed and well-written introduction to the constitution of our day, containing just enough political history to enable the present form of the constitution to be understood and appreciated. For the law student it makes excellent preliminary reading for the study of constitutional law, and provides a useful corrective to an over-legal treatment of the subject. But perhaps the type of reader to whom one would most desire to introduce the book would be the young man or young woman of ability who has a taste for politics or has some idea of seeking admission to the administrative class of the Civil Service. 'The nation,' writes the author (at pp. 65-6), 'requires to devote the service of its ablest members to its own cause. The task of governing is too difficult to be undertaken by ignorant and vacillating minds. Western civilization will be torn down by monomaniacs if the democratic States cannot rely upon the efforts of the most intelligent, the most far-sighted, and the most altruistic of each generation.' If this book fails to kindle enthusiasm in the reader for the art of governing, it is reasonably certain that no other will.

Chapters I and II ('Government by the People' and 'Government by Party') deal with the franchise, modes of election, and the party system. One gathers from the Preface that they are a foretaste of a large-scale study that the author intends to produce and that will take its place by the side of his monumental works on the Cabinet System and Parliament. Chapters III—VII cover some of the ground of these last-mentioned works, but far from being a mere summary of them, they represent a fresh treatment of the leading principles and chief problems involved in the Parliamentary system, the monarchy, the administration and Cabinet government. Chapter VIII is a topical account of 'Government in War-Time,' and the last chapter answers in the affirmative the question 'Is [our, Constitution] a Democracy?'

The book bears no mark of having been produced in war-time; it is printed on good paper with eight interesting illustrations, and is tastefully bound.

G. L. W.

The Theory of Legal Science. By HUNTINGTON CAIRNS. Chapel Hill: The University of North Carolina Press; London: Humphrey Milford. 1941. 155 pp. (12*s.* net.)

In the view of the author of this book, jurisprudence is a science that has been baptized, but is not yet born. He is well acquainted with traditional jurisprudence, for which he has some kind words, but he regards it as a technology rather than as a pure science, which the type of legal study that he wishes to see developed (p. 138). The aim of the existing technology he asserts (somewhat surprisingly) to be law reform (p. 8). In his view, this aim cannot be satisfactorily achieved so long as ' the anticipated results of any serious reform rest not upon knowledge but upon sheer conjecture ' (p. 56). We need to develop a ' pure ' science of law that will serve as the basis of the present technology (or ' applied ' science) devoted to law reform. This pure science of law will study ' human behaviour as a function of disorder ' (p. 1), *i.e.*, ' the principles governing the relations of law and society ' (p. 8). It will thus take its place as one of the social sciences. It will assist law reform by ' revealing to us the consequences of the various courses of action open to us ' (p. 10).

Having whetted his reader's appetite in this way, it might have been expected that the author would pass from precept to example, and formulate one or two of the sociological principles that he has in mind. On this, however, the book is disappointing. The formulation of the propositions of the new legal science is regarded as a matter for the future (pp. 134, 137). We are told (p. 90) that at its present stage legal science must be predominantly descriptive ; it can hardly hope at the moment to indulge in prediction or even in the explanation of facts. The author goes on to suggest (pp. 93-8) that the field of enquiry can be limited to six elements that seem to be ' present in all known systems of law, whether modern, ancient or archaic, or primitive.' These are: (1) ' the regulations of behavior with respect to persons . . . Under this topic would be studied the liabilities of individuals for their conduct, and their powers to affect the conduct of others.' (2) ' The associations or groups of persons whose collective behavior is subject to legal regulation . . . (3) ' The community, which embraces the common life of a definite area.' (4) ' Property.' (5) ' Promises.' (6) ' Administration.' It is not easy to gather from this statement how the new science will differ from the subject that is already well known under the name of comparative law. The author insists (p. 80) that the proposition of his new science will be, as in other pure sciences, either a formally true proposition or an empirical hypothesis. ' It will not be in any sense a precept '; in other words, it will be a statement of behaviour as it is, not of behaviour as it ought legally to be. How such a proposition is to result from such matters as ' the liabilities of individuals [in different legal systems] for their conduct ' is not at all clear. Surely legal liability is a matter of legal precept, and it is not possible to argue from legal precepts to what people actually do.

However this may be, as a work on some of the elements of sociology the book has considerable merit. Mr. Cairns draws on an extensive knowledge of legal history, sociology and science in general to discourse upon the meaning of order in society, culture, the principle of disorder, the inventive process, the theory of forces, causation, hypothesis and verification, concept and fact, the character of change, the classification of data, and the theory of equilibrium. There are also some able discussions of specifically legal questions, such as the origin of custom, the theory of uniform legal development among all peoples, the origin of the testament and primogeniture, sources of law, and the theories of geographical determinism and historical materialism as applied to law.

G. L. W.

Workmen's Compensation. By Sir Arnold Wilson, M.P., and Professor Hermann Levy. Oxford University Press: Humphrey Milford. Vol. I: xxi and 328 pp. 1939. (10*s.*); Vol. II: xi and 383 pp. 1941. (18*s.*)

These two volumes form a masterly survey of the topic of workmen's compensation in all its aspects. The first volume is an account of the growth of the present system, and the second volume is analytical, bearing the sub-title of ' The Need for Reform.' Some day it may become a commonplace that the outlook of the authors is the most fruitful way in which to approach much of our law. We may begin by asking what are the problems that society has to solve in this particular sphere. Clearly we must aim at reducing the number and seriousness of industrial accidents and the incidence of industrial disease. Since, however, accidents will happen, we must ensure that a man and his dependents are adequately maintained whilst he cannot earn and that proper provision is made for his rehabilitation. All this must be done economically. What do we do about it ? We make compensation a matter between employer and workman. The cost to the employer may be high, and so he may be wise and insure, but he need not insure and may be unable to meet a claim. The amount the workman can get is fixed in amount, varying with his wages and subject to a top limit. In general, it is insufficient to maintain an adequate standard of life. The insurance companies spend a large proportion of their premium income on getting work and in costs of administration. To achieve even the meagre level of compensation the workman (backed by his trade union) may have to pursue an expensive legal remedy amid unstable piles of precedents accumulated at prodigious cost. Accident prevention is a State concern, being administered until lately by the Home Office and now by the Ministry of Labour with a body of inspectors. The Private Law of compensation is not co-ordinated with the Public Law of National Health Insurance and Factory Acts.

Half a century of timidity has produced a ghastly muddle. The case for a planned system is overwhelming. War conditions accentuate the situation. Less skilful workers, longer hours and nerve strain tend to increase accidents, and the need for co-ordination of accident prevention, compensation, medical services and rehabilitation can be more readily appreciated. The opposition of vested interests and dogmatic objections to an extension of State services are still strong.

I should like to see these two volumes, and others like them, forming the material for a revitalized law school. I know the difficulties: you cannot study topics like workmen's compensation without wanting to alter things, and traditional universities have not encouraged such studies. But, perhaps, the authors and others who would plan the legal order may be better understood and appreciated in an England that is learning the cost of muddle and inefficiency and the dangers of complacency.

R. M. J.

Kingship and Law in the Middle Ages. By Fritz Kern. Translated and with an Introduction by S. B. Chrimes. Oxford: Basil Blackwell. 1939. xxxi and 214 pp. (12*s.* 6*d.*)

This is Volume IV of the Studies in Medieval History edited by Mr. Geoffrey Barraclough. The first part, The Divine Right of Kings and the Right of Resistance in the early Middle Ages, is a translation of the whole of the text and a selection of footnotes. The second part, Law and Constitution in the Middle Ages, is a translation of the major part of the original. It is easy to agree with Mr. Chrimes that much of the present treatment of Constitutional History is not satisfactory, and that much of our trouble is due to a too insular approach. This English edition of

Professor Kern's work should be of great help to students who cannot consult the original. The unwary may, however, be insufficiently sceptical of the value of many of the author's generalizations. There any many propositions that will puzzle a student of English legal history; for example, p. 151: 'According to medieval ideas, therefore, the enactment of new law is not possible at all.' On some matters, I hope that Professor Kern will have no influence at all. I should hate to find students talking about customary law as something that 'lies in the living legal sense of the people' (p. 159), or being 'a fresh stream of contemporary law springing out of the creative wells of the subconscious' (p. 179), for this is a road that leads to 'thinking with the blood' and living in a world of Germanic myth.

R. M. J.

Cases on the Law of Tort. Second edition. By P. H. WINFIELD, F.B.A.; LL.D. (Cantab.); Hon. LL.D. (Harvard); Rouse Ball Professor of English Law, Cambridge; Fellow of St. John's College, Cambridge; of the Inner Temple, Honorary Bencher and Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1941. xii and 323 pp. (17*s.* 6*d.* net.)

The fact that only three years have elapsed since the appearance of the first edition is adequate proof of the merits of this up-to-date book of cases. It speaks for itself, and the reviewer's task is simply to mention the additions and changes. Three recent decisions become leading cases,—*Radcliffe's case*, *Benham* v. *Gambling*, and *Sedleigh-Denfield's case*, whilst *Konskier* v. *Goodman* is no longer a continuing trespasser. The thoroughness of the revision is well demonstrated in the Notes to the cases; some fifty recent decisions are incorporated. In many instances the Notes have been enlarged and rewritten in the light of these recent developments. Particular mention may be made of the Notes on the cases of *Polemis* and *Loach*, the former for its interesting suggestion for reconciling the conflicting views on the test of remoteness of consequence, the latter for a range-finder on the elusive target of contributory negligence.

T. E. L.

The Mysterious Science of the Law : An Essay on Blackstone's Commentaries. By DANIEL J. BOORSTIN. Cambridge. Harvard University Press; London: Humphrey Milford; Oxford University Press. 1941. xviii and 257 pp. ($3.00; 16*s.* 6*d.* net.)

This is a fascinating and original study of interest to philosophers, to all 'concerned with the problem of method in the social sciences,' to historians and lawyers. It shows how Blackstone in writing his *Commentaries*, was influenced by the ideas of the eighteenth century on 'science, religion, history, aesthetics, philosophy, art, and reason, to give the legal system and the values embodied in it the appearance of rationality and acceptability.' A great deal of the law was complicated and contradictory, but Blackstone succeeded in demonstrating to the people of America and England, except, of course, Bentham and his followers, that it was in accordance with the best scientific notions of the day. He made the law 'a conservative and mysterious science.' Just tribute is paid to the greatness of the *Commentaries* and the comparative merits of Blackstone and Bentham. It is well written, and will be enjoyed by all who are interested in the 'reasoning' process that lies behind much of our law.

T. E. L.

The Conveyancers' Year Book, 1941. By Sir LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law. Vol. 2. London: The Solicitors' Law Stationery Society, Ltd. 1941. xxxvi and 260 pp. (15*s.* net.)

This is a digest of the statutes and cases, orders, and regulations for the year 1940. They are conveniently arranged under about one hundred headings in alphabetical order, ranging from Access to Mountains to Wills. There is a comprehensive cumulative index of about fifty pages to Volumes 1 and 2; this, coupled with the cross references and general arrangement, makes it very easy to find the required information. The comments on recent Parliamentary drafting at p. iii are fully justified. The summaries of cases are extremely well done, and the references given to standard legal works add greatly to the value of the Year Book. Practitioners will save much trouble and time by using this book.

T. E. L.

What's Wrong with International Law? By Dr. W. FRIEDMANN, LL.M. (Lond.). Watts & Co. 1941. 48 pp. (6*d.* net.)

After a brief review of the many breaches of International law in the sphere of the law of peace, of war, and of neutrality alike, committed during the last decade, the author attempts an explanation of these phenomena on the basis of a sociological approach to legal problems. He finds the reasons for the shortcomings of International law to consist, first, in the absence of the necessary international organization, and, secondly, in the weakness of International law itself. The author pleads for an effective international organization comprising a legislature, an executive and a judiciary, and for a 'cosmopolitan outlook on international affairs which includes the conception of humanity as a real addition to that of the nation.'

The booklet gives, at the same time, more and less than the title promises. The author does not purport to show that International law is wrong in the sense that, when applied, it fails to fulfil the function assigned to it. He relies primarily on the argument that International law is defective for the reason that it is not applied, and that an 'international revolution' is raging instead. It may be doubted whether it is not premature to pass judgment while the contest is still in progress; but if it be possible, it must be regretted that in the quest for a sociological approach the historical factor has been neglected. In fairness to International law, it would have appeared that from its birth as a modern system in the seventeenth century, it has served to regulate the conduct of relations between sovereign States. It was not meant to mould the community of nations into a new or better world. Dr. Friedmann has, of course, realized that the problem, as he sees it, is the extra-legal one of international organisation. The shortcomings complained of lie in the structure of the community International law is called upon to serve. But even this problem would be of secondary importance if the author's plea for a cosmopolitan outlook on international affairs became a reality.

K. L.

Studies in Legal Terminology. By ERWIN HEXNER, J.D., D. Pol. Sci., Visiting Professor at the University of North Carolona. Chapel Hill: The University of North Carolina Press; London: Humphrey Milford. 1941. (9*s.* 6*d.*)

The title of this work may give the impression that it deals with such legal terms as ownership, possession, and rights, as dealt with by analytical jurists. Actually it seems to be concerned only with one legal term, namely, 'law' itself, and is no more than another treatment of that well-worn theme, the nature of law. The

questions discussed in the book, as stated on the dust-cover, are: 'Can the rules of human social conduct as determined by a despotic form of government be commonly regarded as belonging to the social pattern called a legal system? Are legal rules necessarily manifested in words? May they reside in the human mind only? Are Courts in the British and American sense essential for calling a social rule system a legal system? Is a certain degree of security and predictability a necessary element of a legal system?' The reviewer confesses to having read the book without much enlightenment on these questions. Some of them, in any case, hardly seemed to be worth the erudition lavished upon them. Chapter V, however, deserves mention for its discussion of Continental administrative law, the meaning of the word 'law' in Dicey's phrase 'the rule of law, the separation of powers, and case-law. The footnotes show the great extent of the author's reading, and are useful as a bibliography.

G. L. W.

Edward Jenks. By R. W. Lee. Offprint from Proceedings of the British Academy, Vol. XXVI. London: Humphrey Milford. 27 pp., with portrait. (2*s.* 6*d.*)

Professor Lee's admirable biographical sketch of Edward Jenks leaves nothing for a reviewer to say except to urge every one interested in legal education to read this account of the struggles, successes and disappointments of an impulsive, combative, but warm-hearted, man in the reform of teaching the law. When he retired, it was with a handsome balance of successes.

The International Labour Code, 1939. A systematic arrangement of the Conventions and Recommendations adopted by the International Labour Conference, 1919—1939. Montreal. 1941. lvi and 920 pp.

This is a useful compilation of the Conventions and Recommendations adopted under the auspices of the International Labour Office. Arranged systematically in twelve books dealing with Employment and Unemployment, General Conditions of Employment, Employment of Children, Young Persons and Women, Industrial Health, Safety and Welfare, Social Insurance, Industrial Relations, Administration of Social Legislation, Seamen's Code, Standards of Colonial Labour Policy, and Migration and Statistics, it enables the student of Social Legislation to acquaint himself quickly with the work of the I.L.O. An excellent introduction and detailed references to a number of appendices add to the value of the book. It was prepared by Mr. C. Wilfred Jenks, Legal Adviser to the I.L.O.

K. L.

The International Conferences of American States: First Supplement, 1933 — 1940. Carnegie Endowment for International Peace. Washington D.C. 1940. Columbia University Press. xxix and 558 pp. ($3.50.)

This is a useful collection of the Conventions and Resolutions adopted by the Seventh and Eighth Pan-American Conferences of 1933 and 1938, the Inter-American Conference for the Maintenance of Peace, 1936, and by the Meetings of the Ministers of Foreign Affairs of the American Republics, held in 1939 and 1940. The present volume supplements the previous volume dealing with the Pan-American Conferences, 1889—1928, published in 1931. The appendices contain synopses of technical Pan-American Conferences, Congresses, Commissions and other bodies, accompanied by a wealth of documentation.

K. L.

The United States and the League, the Labour Organisation and the World Court during 1940. By ARTHUR SWEETSER. Geneva Research Studies, Vol. XI, No. 8, 1940. Geneva Research Centre, Geneva. 1940. ($0.40, or 1.75 Swiss francs.)

As usual, the Geneva Research Centre presents its annual review of the relations between the United States and the League, including its various technical branches. An account is given of the participation of the United States in the work of the various League institutions, especially in connection with the Economics and Financial Departments, now partly evacuated to Princeton, the Opium Advisory Committee, the International Labour Office, at present installed at Montreal, and the Permanent Court.

K. L.

Article XIX of the Covenant of the League of Nations. By PITMAN B. POTTER. Geneva Studies, Vol. XII, No. 2, 1941. Geneva Research Centre. 98 pp. ($0.40, or 1.75 Swiss francs.)

In this study Professor Potter presents a survey of the background, the origins, and the operation of Article XIX of the Covenant, consecrating the principle of treaty revision. The attempts to apply the article, all of which proved unsuccessful, are carefully examined. In conclusion, the author discusses, with a view to future improvements, the reasons which contributed to its failure. These reasons are to be found in the requirement of unanimity in the Assembly vote, the absence of appropriate organisation and procedure, the lack of authority, both legal and physical, in the League, and the preference for the more familiar methods of diplomacy and power politics. The book will prove useful to students of League procedure, and to all those interested in international organization.

K. L.

Also received:—

International Aspects of European Expropriation Measures. By MARTIN DOMKE. American Foreign Law Association, Proceedings No. 22. Published November, 1941. Address delivered at Lawyers' Club, New York City.

Law and the New Logic. By MIRIAM THERESA ROONEY. Reprinted from Proceedings of American Catholic Philosophical Association and University of Detroit Law Journal. 4, 126—152, March, 1941.

Chicago Bar Record. Vol. XXII. Nos. 6, 7, 8, 9, 10. Published by the Chicago Bar Association, 1941.

The following arrived too late, but will be reviewed in the next issue:—

Free Speech in the United States. By ZECHARIAH CHAFEE, Jr, Langdell Professor of Law in Harvard University. Cambridge, Massachusetts; Harvard University Press; London: Sir Humphrey Milford, Oxford University Press. 1941. xiv and 634 pp. ($4.00; 22*s.* 6*d.* net.)

Law as Logic and Experience. Storrs Lectures on Jurisprudence. Yale School of Law, January, 1940. By MAX RADIN. New Haven: Yale University Press; London: Humphrey Milford, Oxford University Press. 1940. ix and 171 pp. ($2.00: 12*s.* net.)

Sociology of Law. By GEORGES GURVITCH, Ph.D., LL.D., D. es L.; formerly Professor in Sociology at the University of Strasbourg; Professor at the New School for Social Research. Preface by ROSCOE POUND. Philosophical Library and Alliance Book Corporation, New York. xx and 309 pp. ($3.75.)

Concerning English Administrative Law. By Sir CECIL THOMAS CARR. London: Humphrey Milford, Oxford University Press. 1941. ix and 189 pp. (10*s.* 6*d.* net.)